86-1242

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF AKRON, STATE OF OHIO; HEALTH COMMISSION, CITY OF AKRON; HEALTH DEPARTMENT, CITY OF AKRON; C. WILLIAM KECK, as Director of Health of the City of Akron; HAROLD K. STUBBS, as Director of Law of the City of Akron,

Appellants,

v.

OHIO MANUFACTURERS' ASSOCIATION; AKRON SELLE COMPANY,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Akron, Ohio has enacted a "right-to-know" ordinance, which imposes certain labeling and other disclosure requirements upon employers using hazardous and toxic substances in the workplace. The Department of Labor, acting under Section 6 of the Occupational Safety and Health Act of 1970 (the OSH Act), 29 U.S.C. § 655, has promulgated a federal "hazard communication standard," 29 C.F.R. § 1910.1200, which imposes similar but not identical requirements on certain classes of employers. Under Section 18 of the OSH Act, 29 U.S.C. § 667, "any State" wishing to regulate an occupational safety and health issue governed by a federal standard may do so only pursuant to a "State plan" which must be approved by the Department of Labor, and which, once approved and placed in effective operation for three years, displaces the federal standard for that state. The questions presented are:

1. Whether the Akron ordinance, to the extent that it regulates workplace practices of employers governed by the federal standard, is preempted by Section 18 of the OSH Act, despite the fact that Section 18 refers only to the states and is wholly silent with respect to local laws.

2. Whether, if Section 18 of the OSH Act does not preempt the Akron ordinance, the hazard communication standard issued by the Department of Labor should be construed as doing so, and if it is to be so construed, whether the issuance of such a preemptive standard is within the authority of the Department under the OSH Act.

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Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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JURISDICTIONAL STATEMENT

Appellants, who are the City of Akron, Ohio, and certain of its agencies and officials,[1] appeal from the judgment of the United States Court of Appeals for the Sixth Circuit entered on September 17, 1986, holding that Akron's "right-to-know" ordinance is preempted by the

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[1] All parties in the court below are listed in the caption. In addition to those parties, *amicus curiae* briefs were filed below by the Secretary of Labor and various industry and labor groups. These *amici* are listed in footnote 2 of the court of appeals' opinion (A. 2a).

hazard communication standard issued under the Occupational Safety and Health Act of 1970 by the Department of Labor, to the extent that the ordinance applies to workplace practices of employers governed by the federal standard.

OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported; it is reproduced in the Appendix at page 1a. The opinion of Judge Ann Aldrich of the United States District Court for the Northern District of Ohio, Eastern Division is reported at 628 F. Supp. 623 and is reproduced in the Appendix at page 22a.

JURISDICTION

This action was brought by appellees Ohio Manufacturers' Association and Akron Selle Company to enjoin enforcement of Chapter 1830 of the Codified Ordinances of the City of Akron, Ohio, on the ground, *inter alia*, that it was preempted by federal law. Jurisdiction was founded upon 28 U.S.C. § 1331. The district court entered judgment for the defendants, but on appeal the court of appeals reversed, holding that the ordinance was preempted to the extent that it applied to workplace practices of employers governed by the federal hazard communication standard, 29 C.F.R. § 1910.1200, issued by the Department of Labor pursuant to Section 6 of the OSH Act, 29 U.S.C. § 655.

The judgment of the court of appeals (A. 60a) was entered on September 17, 1986. Appellants then filed a timely petition for rehearing, which the court of appeals denied by an order dated October 31, 1986. (A. 61a).

This court has jurisdiction of the present appeal pursuant to 28 U.S.C. § 1254(2).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATION INVOLVED

This case involves Article VI, Cl. 2 (the Supremacy Clause) of the Constitution; Sections 2, 3, 6, 18, and 23 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651, 652, 655, 667, 672; the Hazard Communication Standard issued by the Occupational Safety and Health Administration (OSHA) of the Department of Labor, 29 C.F.R. § 1910.1200; and Chapter 1830 of the Codified Ordinances of the City of Akron, Ohio; all of which are set forth in the Appendix at pp. 63a-125a.

STATEMENT OF THE CASE

Appellees Ohio Manufacturers' Association and Akron Selle Company brought this action in the United States District Court for the Northern District of Ohio to enjoin enforcement of the "right-to-know" ordinance of the City of Akron, Ohio, which imposes certain labeling and other disclosure requirements on employers using hazardous and toxic substances. The ordinance, Chapter 1830 of the Codified Ordinances of the City of Akron, is reproduced in the Appendix at pages 64a-88a, and is described more fully below (pp. 6-7, *infra.*)

The complaint challenged the ordinance on three grounds: (1) that it was preempted by the federal Occupational Safety and Health Act of 1970 and the hazard communication standard issued thereunder by the Department of Labor, which deals with the same general subject matter, (2) that it imposed an undue burden on interstate commerce in violation of the Commerce Clause of the Constitution, and (3) that in certain respects it conflicted with and was preempted by an Ohio statute. Appellees later abandoned the latter two grounds and placed their full reliance on the federal preemption claim.

The District Court Decision

After a hearing, the district court issued a memorandum and order granting judgment for appellants. (A. 22a) The court rejected appellees' principal argument that Section 18 of the OSH Act, 29 U.S.C. § 667, was intended to apply to local ordinances as well as to state statutes. Section 18 precludes any "State" from regulating matters governed by a federal occupational safety and health standard except pursuant to a "State plan" approved by the Secretary of Labor in accordance with procedures set out in the Section. Once a state plan has been approved and found to be effective in operation, it displaces the federal standard and the federal enforcement mechanism. The court concluded from the language of the statute, its legislative history, and a comparison of Section 18 with the preemption provisions of other federal regulatory statutes, that Section 18 was intended to apply only to state statutes, not local ordinances. Moreover, the court found that the purpose of the OSH Act as a whole was not to preempt state and local laws with a uniform federal regulatory scheme governing occupational health and safety, but rather to establish minimum federal standards which the states (subject to the procedures of Section 18) as well as local governments remain free and are even encouraged to supplement with more stringent requirements.

The district court also rejected appellees' argument that the federal hazard communication standard should be construed as preempting local ordinances dealing with the same subject matter. Appellees based this argument largely on certain language which appeared in the explanatory preambles that accompanied both the proposed and final standard. The court held that these preambles were not part of the standard and did not have the force of law, as they were not adopted in accordance with the rulemaking procedures of the Administrative Procedure Act. Moreover, the court held, if the standard were to

be construed as preempting local ordinances it would be in conflict with the intent of Congress as expressed in the OSH Act itself, and therefore in excess of the Labor Department's authority under the Act.[2]

The Court of Appeals Decision

On appeal, the Sixth Circuit reversed. Although the court of appeals agreed with the district court that Section 18 of the OSH Act did not preempt local ordinances, the court concluded that the hazard communication standard issued by the Department of Labor, when read in light of the preambles relied on by appellees, expressed an intent by the agency to preempt both state statutes and local ordinances dealing with the same subject matter. The court held that the agency had authority to issue such a preemptive regulation despite the absence of any indication of preemptive intent in the OSH Act itself.

Although the court of appeals held the ordinance preempted to the extent that it attempts to regulate safety in the workplace of employers governed by the federal standard, the court noted that "the ordinance also had as its purpose protection of the public and the providing of information to city fire fighters and public health officials regarding toxic and hazardous substances." (A. 21a) Accordingly, the court remanded the case to the district court "to determine which portions of the ordinance are preempted and whether those portions that are not preempted are severable." (*Id.*)

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[2] The district court recognized that if the Akron ordinance created an "actual conflict" with the federal standard by making compliance with both a "physical impossibility" or by frustrating the federal policy then the ordinance would have to give way to the federal standard. (A. 48a) However, after analyzing nine separate areas in which appellees alleged that such a conflict existed, the court concluded that there was no such conflict and that employers could comply with both the ordinance and the federal standard. (A. 48a-57a)

The Akron Ordinance

As stated in its preamble, the Akron ordinance was enacted to protect workers, firefighters, and the public by requiring "the labeling of toxic and hazardous substances" and making available "information about such substances to employees, public officials, and other affected persons." (A. 64a) It applies to employers in various specified Standard Industrial Classification (SIC) Codes (§ 1830.03(i)), including but not limited to those governed by the federal hazard communication standard discussed below. Certain employers and substances are exempted. (§ 1830.02)

The ordinance calls for the promulgation of a Master List of Hazardous Chemicals by the Akron Health Commission. (§ 1830.05) Employers that manufacture, use, or store such chemicals are required to take the following actions:

—Post a sign notifying employees of their right to certain information concerning those chemicals. (§ 1830.06 (a))

—Develop a hazard communication program in accordance with certain criteria specified in the ordinance. (§§ 1830.06(b), 1830.07 through 1830.11)

—Label each container of hazardous chemicals with certain specified information. (§ 1830.07)

—File with the Akron Health Department each year a list of all work areas where hazardous chemicals are manufactured, used or stored and identifying such substances by their chemical name. (§ 1830.09(a)(1))

—Immediately report to the Health Department any information concerning any spill, leak, discharge or emission of any hazardous substance that is required to be submitted to any federal or state agency under applicable law. (§ 1830.09(a)(2))

—File with the Health Department a copy of any construction or operating permit that sets forth conditions for or limitations on the discharge or emission of any hazardous chemical. (§ 1830.09(a)(3))

—Obtain or develop for each hazardous chemical that the employer manufactures, uses, or stores a "material safety data sheet" (MSDS) that contains certain specified information including the identity of the substance, its physical and chemical characteristics, its known health effects, the primary route[s] of entry and permissible exposure limits, precautions for safe handling, control measures, emergency and first aid procedure, the date of preparation of the MSDS, and the identity of the preparer. (§ 1830.10(a))

—Provide a copy of the MSDS to any employee, designated employee representative, or the Akron Health Commission within one business day of any request for such a copy. (§ 1830.10(b))

—Establish an employee training and education program to provide employees the information needed to understand the hazards of substances to which they may be exposed, the hazard communication methods used by the employer, appropriate work practices, protective measures, emergency procedures, and the means for obtaining information under the ordinance. (§ 1830.11)

In addition, the ordinance provides procedures for obtaining variances (§ 1830.08), for protecting trade secrets (§ 1830.14), for enforcement of its requirements (§§ 1830.12, 1830.13), and for protecting employees against retaliation for exercising their rights under the ordinance (§ 1830.15)

The Federal Hazard Communication Standard

The federal hazard communication standard, 29 C.F.R. § 1910.1200, was promulgated by the Department of Labor pursuant to Section 6 of the OSH Act, 29 U.S.C.

§ 655. Its stated purpose "is to ensure that the hazards of all chemicals produced or imported by chemical manufacturers or importers are evaluated, and that information concerning their hazards is transmitted to affected employers and employees within the manufacturing sector." (§ 1910.1200(a))

The term "employer" is defined by the standard as "a person engaged in a business within SIC Codes 20 through 39 where chemicals are either used, or are produced for use or distribution." (§ 1910.1200(c)) Therefore, when the word "employer" is used in the standard (or in the following summary of its provisions), it refers only to these categories of employers.

The standard requires chemical manufacturers and importers to evaluate the chemicals they produce or import "to determine if they are hazardous." Employers who are not chemical manufacturers or importers are entitled to rely on the evaluation performed by the manufacturer or importer. Procedures for performing the evaluations are outlined in the standard. Certain chemicals are identified by the standard as being hazardous or carcinogens, but—unlike the Akron ordinance—no comprehensive list of hazardous chemicals is provided. (§ 1910.1200(d))

Chemical manufacturers, importers, or distributors are required to label "each container of hazardous chemicals leaving the workplace" with information identifying the hazardous chemical, "[a]ppropriate hazard warnings," and the name and address of the manufacturer, importer, or other responsible party. (§ 1910.1200(f))

Chemical manufacturers and importers are also required to develop an MSDS for each hazardous chemical they produce or import, which must contain "at least the following information:" specified data relating to the identity of the hazardous chemical, the physical and chemical characteristics of the hazardous chemical, the

physical hazards of the chemical, the health hazards of the chemical, the primary route(s) of entry, permissible exposure limits as prescribed by law or recommended by the preparer of the MSDS, whether the chemical is listed in certain specified compilations of hazardous chemicals, any generally applicable precautions for safe handling, any generally applicable control measures, emergency and first aid procedures, the date of preparation of the MSDS, and the name and address of the preparer. (§ 1910.1200(g)(2))

The MSDS must be provided to distributors and manufacturing purchasers of hazardous chemicals. (§ 1910.1200(g)(6)) Distributors, in turn, must provide the MSDS to other distributors and manufacturing purchasers. (§ 1910.1200(g)(7))

Employers must maintain copies of the MSDS for each hazardous chemical in the workplace and ensure that it is accessible during each work shift to employees in the work area. (§ 1910.1200(g)(8)). They must also make them available upon request to employee representatives and to the Department of Labor. (§ 1910.1200(g)(10))

Employers are required to develop and implement a written hazard communication program (§ 1910.1200(e)) and an employee training program (§ 1910.1200(h)(2)). The requirements of both programs are stated as minimums—i.e., the communication program must provide "at least" certain specified information, and the training program must include "at least" certain specified elements.

The standard also contains procedures for protecting trade secrets. (§ 1910.1200(i))

Both at the time the hazard communication standard was initially proposed and when it was finally adopted, the Department of Labor expressed the view that any

federal standard adopted would have the effect of preempting both state and local laws dealing with the same subject matter. Thus the preamble to the proposed standard, after noting the concern expressed by "a number of industry representatives" about the "potential for conflicting or cumulatively burdensome state and local laws," stated:

> A single, comprehensive Federal Standard for hazard communication would eliminate this conflict, decrease the cumulative burden of compliance, and insure basic protection for all employees.

47 Fed. Reg. 12095 (1982). Similarly, in the preamble to the final standard, the Department again referred to "burdensome State and local laws" as a reason cited "by industry representatives" for promulgation of a federal standard. 48 Fed. Reg. 53284 (1983).

The standard as adopted, however, says nothing about local right-to-know ordinances; it merely paraphrases the effect of Section 18 of the OSH Act on *state* laws:

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject. Any state which desires to assume responsibility in this area may only do so under the provisions of section 18 of the Occupational Safety and Health Act (29 U.S.C. 651 et seq.) which deals with state jurisdiction and state plans.

(§ 1910.1200(a)(2))

The Differences Between The Akron Ordinance and The Federal Standard

As the above summaries indicate, the Akron ordinance and the federal hazard communication standard are quite similar in their basic requirements. There are,

however, some differences betwen them, although, as the district court found, employers would have no difficulty complying with both.

One obvious but important difference is that the ordinance is enforceable by local officials, while the federal standard is enforced by the Department of Labor. Because the Department of Labor has limited resources and nationwide responsibilities—which include enforcement not only of this occupational health and safety standard but several others—the presence of a local ordinance with its own enforcement mechanism will greatly enhance the likelihood that the shared goals of both the federal and state regulations will be achieved.

Other differences between the ordinance and the federal standard include the following:

—The ordinance covers a broader group of employers than those subject to the federal standard. It is undisputed, however, that the ordinance is not preempted to the extent that it applies to employers not subject to the standard.

—The ordinance provides for the establishment of a Master List of Hazardous Chemicals to which the various labeling and disclosure requirements are applicable, while the federal standard, although identifying certain hazardous chemicals, assigns to chemical manufacturers and importers the responsibility of determining which other chemicals are hazardous. It is therefore possible that the ordinance might cover some chemicals not subject to the federal standard, or vice versa.

—The labeling and MSDS provisions of the ordinance require that each hazardous chemical be identified by its technical name (§§ 1830.03(a), 1830.07, 1830.10), while the federal standard provides the option of using either the technical name or "any designation such as code name, code number, trade name, brand name or generic name." (§§ 1910.1200(c), (f)(1), (g)(2)(i)) Use of

the technical name would, of course, constitute compliance with both regulations.

—The federal standard requires the labels on hazardous chemicals to provide "appropriate hazard warnings," but does not otherwise prescribe the nature of such warnings. (§ 1910.1200(f)(iv)(2)) The ordinance specifically requires a cancer warning for all chemicals identified on the Master List as carcinogens (§ 1830.07(a)(3)), and a reproductive warning for all chemicals that pose a reproductive hazard. (§ 1830.07(a)(4))

—The ordinance, unlike the federal standard, requires that certain information concerning hazardous chemicals be filed with local authorities.

—There are some differences in the protections provided by the ordinance (§ 1830.14) and the federal standard (§ 1910.1200(i)) for trade secrets, and the procedures by which those protections may be invoked.

THE QUESTIONS ARE SUBSTANTIAL

This case presents questions of fundamental importance concerning both the Occupational Safety and Health Act of 1970 and, more generally, the law of federal preemption. The importance of these questions is underscored by the unusually large number of *amicus* briefs that were filed below by organizations representing a broad spectrum of industry and labor interests as well as by the Secretary of Labor. At stake in this case is not merely the validity of one local ordinance, but the right of all local governments to enact "right-to-know" legislation to protect the health and safety of their citizens.[3] Also involved is the question of the extent to

[3] In the rulemaking proceeding relating to the federal hazard communication standard, the Department of Labor noted that "six local governments have some type of regulation related to the identification of hazardous substances," and that "three other local governments have introduced proposed legislation either in this

which a federal agency may by regulation preempt state or local law when the governing federal statute itself does not so, a question that is becoming increasingly important in a variety of regulatory contexts. See Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 Va. L. Rev. 1429 (1984).

I.

The threshhold issue is whether Section 18 of the OSH Act, which permits the *states* to regulate matters governed by a federal occupational and health standard only pursuant to state plans that have been approved by the Labor Department, should be construed as totally preempting *local* ordinances regulating such matters. Although the courts below were unanimous in their conclusion that Section 18 applies only to state statutes, not local ordinances—a conclusion with which appellants agree—the question is nevertheless substantial and would necessarily have to be reexamined in connection with this appeal. As the Secretary of Labor stated in his *amicus curiae* brief below, it is "an important and novel question of statutory construction."

There is no need to present in this Jurisdictional Statement a full argument on the merits of this issue, but a few basic points deserve mention. First, we are dealing here with community health and safety, a field which the state and local governments have "traditionally occupied." In such a case, this Court has repeatedly held, the assumption is that state and local legislation was "not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977);

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legislative session or in previous sessions." 48 Fed. Reg. 53284 (1983). In Ohio, in addition to Akron, the cities of Canton, Cleveland, Cincinnati, Kent, Hamilton, and Norwood have such ordinances.

Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 105 S. Ct. 2371, 2376 (1985).

The OSH Act, far from expressing any "clear and manifest purpose" to preempt state and local laws, has as one of its basic objectives to encourage more effective state and local regulation of occupational health and safety. While this purpose is expressed most clearly with respect to the states, there is no indication in either the statute or its legislative history that Congress had any different intent with respect to local governments. The goal of the legislation was to improve the safety and health of American workers through more effective and aggressive regulation at all levels of government.

This goal is apparent even from the Preamble to the legislation, which describes its purposes to be:

> To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; *by assisting and encouraging the States in their efforts to assure safe and healthful working conditions;* by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.

(A. 89a, emphasis added). In the body of the statute itself, the stated purposes include "encouraging the states to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws" and "improv[ing] the administration and enforcement of State occupational safety and health laws . . . ." § 2(11), 29 U.S.C. § 651(11). These goals are implemented, *inter alia*, by provisions for grants to the states "to assist them . . . in identifying their needs and responsibilities in the area of occupational safety and health" and "otherwise improving the administration of State occupational safety and health laws . . . ." § 23(a), 29 U.S.C. § 672(a).

Although Section 18 of the Act places some limits on state authority, its purpose was not to exclude the states

from regulating occupational safety and health but rather to ensure that any such regulation did not undercut or conflict with federal standards. Thus, Section 18(a) preserves the full authority of the states with respect to matters not covered by any federal occupational safety and health standard issued under the Act. Once a federal standard has been adopted with respect to a particular subject, the states are still free to regulate that subject, but only pursuant to a "State plan" that is approved in accordance with Section 18(c). This approval procedure is not designed to discourage state regulation but rather to create a mechanism by which the states, through adoption of satisfactory state plans, could take full control of worker safety and health within their boundaries and *replace* (or preempt) the federal regulation with their own. Thus, once a state plan has been approved and found to have been effective for three years, the federal standard governing the same subject matter ceases to apply in that state and the state's regulation becomes exclusive. *See* § 18(e), 29 U.S.C. § 667(e). To encourage the states to adopt state plans under Section 18, Congress provided for grants to the states both to "assist them . . . in developing State plans" during the first three years after enactment of the OSH Act and then "to assist them in administering and enforcing" such state plans. § 23(a) & (g), 29 U.S.C. § 672(a) & (g). Congress expected at the time the legislation was enacted that "practically all states" would take advantage of these grants to develop their own health and safety laws. *See* H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 33 (1970) (reprinted in *Legislative History of the Occupational Safety and Health Act*, published by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (1971) (hereinafter "Legis. Hist.") p. 863)

In short, the limitations imposed on state laws by Section 18 were not intended to preempt those laws, but rather to ensure that, once a federal standard was in

place, any state regulation of the same subject matter would meet certain requirements prescribed in Section 18(c)—particularly, the requirement that the state regulation be "at least as effective in providing safe and healthful employment and places of employment" as the federal standard it is intended to displace.[4] The primary goal of Section 18, consistent with the policy of the statute as a whole, is not to preempt state laws but to encourage them.

There is no indication, either in the language of Section 18 or in its legislative history, that it was intended

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[4] By stating that the state regulation must be "at least as effective" as the federal standard, the Act makes clear that the states are free to adopt *more* effective or stringent rules, and that uniformity of regulation is not a goal of the Act. In the courts below, appellees and some of the *amici*, including the Secretary of Labor, suggested that Section 18(c)(2) does limit the authority of the states to adopt different or more stringent regulations by requiring, as a condition of approval of state plans, a finding that such plans "when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce." The legislative history of this language, however, which was added by amendment in the Senate, indicates that it had a very narrow purpose. As explained by Senator Saxbe, its sponsor, the amendment was intended only to prevent the states from setting "differing safety standards" for specific *products*, such as "dirt movers, tractors, and other heavy equipment," which would impede the movement of such products from state to state and thus impose an undue burden on interstate commerce. Legis. Hist. 500-01. *See also id.* at 1018 (remarks of Congressman Erlenborn), 1041 (remarks of Congressman Railsback). Until 1982, the Department of Labor interpreted and applied this provision in accordance with its narrow purpose, but since 1982 the Department has taken the position that *any* state plan must be shown to be "required by compelling local conditions." *See* Foote, *Administrative Preemption: An Experiment In Regulatory Federalism*, 70 Va. L. Rev. 1429, 1452-61 (1984) The author of the cited article concludes that this is a gross misinterpretation of the Act and one of several instances in which the Reagan administration has sought to protect industry from state and local regulation by improper use of administrative preemption.

to place any limits whatsoever on local, as distinguished from state, laws. There is, for example, no provision for approval of "local" plans similar to the provisions governing approval of state plans. Neither is there any provision in the Act for grants to local governments to assist them in administering or enforcing local health and safety laws. The entire mechanism established by Section 18 applies solely to "States."

The courts below cited eight other federal regulatory statutes that contain express preemption provisions, all of which provide explicitly that the laws of both "states and their political subdivisions" are preempted. (A. 10a-11a, 34a). It is hardly likely, therefore, that Congress' failure to mention "political subdivisions" in Section 18 of the OSH Act was a mere oversight, particularly since other provisions of the Act do refer specifically in other contexts to "political subdivision[s]" of the states. §§ 6(b)(1), 18(c)(6), 24(b)(2), 29 U.S.C. §§ 655(b)(1), 667(c)(6), 673(b)(2).

Of course, if the Akron ordinance or any other local law conflicted directly with the OSH Act or a standard issued thereunder, either by making compliance with both a "physical impossibility," *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963), or by posing an "obstacle to the accomplishment and execution of the full purposes and objectives" of the Act or the standard, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), then to that extent the ordinance would have to give way to the overriding federal law. But that is not the issue here. Although appellees contended below that certain provisions of the ordinance did present such a conflict, the district court found otherwise and the court of appeals did not disagree. The issue here is not whether there is any direct conflict between the Akron ordinance and the federal hazard communication standard, but whether Congress intended to exclude local governments totally from regulating in any manner any area which is the

subject of a federal occupational safety and health standard. For the reasons stated above and by both courts below, we contend that it did not.

II.

Although the courts below were in agreement that the OSH Act itself did not preempt the Akron ordinance, they differed as to whether the federal hazard communication standard should nevertheless be construed as doing so, and if so construed whether the Department of Labor was authorized by the Act to issue such a preemptive standard.

The question of the Department's authority to preempt has an importance that transcends this particular case, because the same question is likely to recur under other regulatory statutes. As one commentator has observed:

> In the last few years, . . . the federal government has declined in regulatory zeal, and states and localities have become more protective. Faced with stricter state laws varying from state to state, businesses have begun to lobby for uniform federal regulations that would preempt more protective state laws. In response, some federal agencies are exercising their preemptive powers, generating conflicts with states whose laws are being challenged. Some agencies are even attempting to declare that state laws on a given issue are preempted by the agency's decision not to regulate.

Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 Va. L. Rev. 1429, 1430-31 (1984) (footnotes omitted). The cited article expresses the view that the Labor Department, as well as other agencies administering other statutes, "have failed to protect the states' interests in health and safety as Congress intended that they do under the administrative preemption provisions," and that "a searching reevaluation of administrative preemption is needed." *Id.* at

1431-32. This case presents an appropriate vehicle for such a reevaluation.

The hazard communication standard does not on its face express any intent to preempt local laws. The only reference to preemption is in Section 1910.1200(a)(2) (quoted at p. 10, *supra*), which merely restates the limited preemptive effect of Section 18 of the Act on *state* laws. It is true that the preambles to the proposed and final standard discussed both state and local laws, and seemed to imply that both would be preempted if a final standard were adopted. (*See* pp. 9-10, *supra.*) There is no indication, however, that the preambles reflected a conscious policy *choice* by the Department of Labor to preempt local ordinances. Rather, they merely reflect the Department's legal opinion that such preemption would be automatic once the standard was adopted. The Department's view, which it expressed in its *amicus curiae* brief in the court of appeals (pp. 11-12), is that "the structure and language of the OSH Act, as well as its history and purposes, all point unmistakably toward *statutory* preemption of municipal ordinances addressed to the same subject as a federal occupational safety and health standard." (Emphasis added.) Given this view of the law, the Department could not have exercised any discretion with respect to this issue, because it apparently did not believe it had any such discretion.

But if the standard is to be interpreted as reflecting an intent to preempt local ordinances, the question remains whether the Department of Labor has authority to issue such a preemptive regulation. To our knowledge, this Court has never been confronted by an administrative agency's effort to preempt an *entire field* of state or local regulation where the underlying federal statute does not itself do so. The cases in which the Court has upheld administrative preemption in the past have involved situations in which only a *specific provision* of state law was preempted, because it directly conflicted

with a federal regulation that was clearly authorized by the underlying federal statute. *See Cable Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (state prohibition on liquor advertising via cable television preempted because it conflicted with FCC regulations governing cable signal carriage); *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982) (state prohibition against enforcement of "due on sale" provisions in mortgages preempted because it conflicted with federal regulation expressly authorizing such provisions); *United States v. Shimer*, 367 U.S. 374 (1961) (state prohibition against recovery of balance of mortgage loan remaining outstanding after foreclosure preempted because it conflicted with federal regulation authorizing such recovery by Veterans' Administration under federally guaranteed loan).

The only previous case before this Court which raised the issue of whether a federal regulation preempted an entire field was *Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371 (1985), but there the Court found that the agency itself did not intend its regulation to preempt local law. Thus, the Court did not have to decide whether the agency had authority to preempt an entire field of regulation.

Such an effort by an administrative agency to preempt an entire field in the absence of clear legislative authority to do so requires close judicial examination. "The agency is an interested party, not an independent arbiter." Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 Va. L. Rev. 1429, 1441 (1984). Unlike the Congress, whose members represent their respective states, federal administrators have no allegiance to state interests and have an inevitable bias in favor of federal regulatory policies. For this reason, the deference that courts customarily grant to administrative decisions in other areas—and that the court of appeals granted to the Department of Labor in this

case (A. 19a-20a)—is inappropriate with respect to administrative preemption of state and local law. This case affords this Court an opportunity to establish needed standards for determining when preemption of an entire field by administrative fiat should be allowed.

We believe the hazard communication standard, if construed to preempt local right-to-know ordinances, exceeded the Labor Department's statutory authority. This is so not only because, as shown above, the policy of the Act is to encourage, not exclude, state and local regulation, but also because the role of the Labor Department under the Act is quite limited. The Department does not have plenary authority to interpret or administer the Act; its sole function under Section 6, 29 U.S.C. § 655, is to promulgate "occupational safety and health standard[s]." The Act defines that term in Section 3(8), 29 U.S.C. § 652(8), as follows:

> The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

This definition merely gives the Department authority to prescribe rules to be followed by employers to protect the health and safety of their employees. It does not give the Department authority to preempt local ordinances dealing with the same subject matter, so long as they are not in direct conflict with the federal standard.[5]

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[5] In *United Steelworkers v. Auchter*, 763 F.2d 728 (3d Cir. 1985), the question was presented whether the hazard communication standard was properly a "standard" within the meaning of Section 6 of the Act, 29 U.S.C. § 655, or whether it should have been issued as a "regulation" under Section 8(b)(3), 29 U.S.C. § 657(b)(3). The court held that it was properly issued as a "standard," but noted that if it were a regulation its provision

In *Hillsborough County v. Automated Medical Laboratories, Inc., supra,* this Court exercised its appellate jurisdiction to decide whether a federal regulation regulating blood plasma was intended to preempt a local ordinance dealing with the same subject matter. This case presents not only a similar question with respect to another federal regulation dealing with an important health and safety area, but also much broader questions as to the meaning of the underlying statute itself and the agency's authority under it. Moreover, this case provides the Court an opportunity, for the first time, to establish standards for determining when a federal agency may preempt an entire field from state or local regulation. These are all substantial questions warranting the attention of this Court.

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purporting to preempt state laws might well have been beyond the Secretary's authority:

> The Secretary's inclusion of an express reference to preemption in the manufacturing sector appears to have been motivated at least in part by the desire to reduce the regulatory burden posed by multiple state laws. 48 Fed. Reg. 53284 (1983). That purpose is arguably at odds with congressional intention that the OSH Act provide a federal floor for safety in the workplace. Reduction of burdens posed by multiple state laws does not appear to have been a significant congressional concern; rather, Congress favored a uniform federal law so that those states providing vigorous protection would not be disadvantaged by those that did not.

763 F.2d at 734. In other words, the preemption provision of the standard is only valid insofar as it implements Section 18 of the Act; to the extent that it is construed to go farther it conflicts with the purposes of the Act.

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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January 28, 1987

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No. ———

Supreme Court, U.S.
FILED
JAN 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF AKRON, STATE OF OHIO; HEALTH COMMISSION, CITY OF AKRON; HEALTH DEPARTMENT, CITY OF AKRON; C. WILLIAM KECK, as Director of Health of the City of Akron; HAROLD K. STUBBS, as Director of Law of the City of Akron,

Appellants,

v.

OHIO MANUFACTURERS' ASSOCIATION; AKRON SELLE COMPANY,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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APPENDIX TO JURISDICTIONAL STATEMENT

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-3191

OHIO MANUFACTURERS' ASSOCIATION;
AKRON SELLE COMPANY,
Plaintiffs-Appellants,

v.

CITY OF AKRON, STATE OF OHIO; HEALTH COMMISSION, CITY OF AKRON; HEALTH DEPARTMENT, CITY OF AKRON; C. WILLIAM KECH, as Director of Health of the City of Akron; HAROLD K. STUBBS, as Director of Law of the City of Akron,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed September 17, 1986

Before: MARTIN and GUY, Circuit Judges; and BROWN, Senior Circuit Judge.

GUY, Circuit Judge, Plaintiffs appeal the district court's judgment in favor of defendants entered after the court determined that the Akron "Right to Know" Ordinance, regulating hazardous and toxic substances in the workplace, was not preempted by the Occupational Safety and Health Act (OSH Act) of 1970, 29 U.S.C. § 651, *et seq.*, or the Occupational Safety and Health Agency's (OSHA) Hazard Communication Standard, 29 C.F.R. § 1910.

Plaintiffs are the Ohio Manufacturers' Association, a non-profit membership association representing 61 employers in the City of Akron, classified within Standard Industrial Classification (SIC) Codes 20 through 39, and Akron Selle Company, an Akron contract metal stamping company employing 20 persons and classified within SIC Code 34.[1] Defendants are the City of Akron; Akron's Health Commission; Akron's Health Department; C. William Kech, M.D., Director of Health; and Harold K. Stubbs, Director of Law. The latter four defendants share responsibility for the enforcement of the ordinance. Plaintiffs brought suit, claiming that the Akron ordinance is preempted by federal law.[2] Although we reject many of plaintiffs' contentions, as did the trial court, we nonetheless find preemption and reverse.

I.

A. *The Akron Right to Know Ordinance*

Akron's Right to Know Ordinance, enacted in December of 1984, regulates the presence of hazardous and

---

[1] SIC Codes 20 through 39—consist primarily of categories of manufacturers as set forth in the Standard Industrial Classification Manual published by the United States Office of Management and Budget.

[2] In the district court and on appeal, *amici curiae* briefs were submitted by several Akron community groups, including the Rubber Manufacturers' Association; the Chemical Manufacturers' Association; the National Paint and Coatings Association Inc.; the Society of the Plastics Industry, Inc.; Flexible Packaging Association and the National Screw Machine Products Association (jointly); and by the Akron Catholic Commission; The Akron-Medina County Labor Council, (AFL-CIO); the Ohio Public Interest Campaign; the Opportunity Parish Ecumenical Neighborhood Ministry; the United Rubber, Cork, Linoleum & Plastic Workers of America and the United Rubber Workers, Local 2 Retirees (jointly). On appeal the Secretary of Labor was permitted to file an *amicus curiae* brief.

toxic substances in the workplace. The purposes of the ordinance are twofold: to protect workers by requiring employers to provide information to their employees and designated representatives about hazardous chemicals to which the employees may be exposed; and to protect public health officials, and the public in general, by requiring employers to provide information to the City's Fire Division and Health Department about the hazardous chemicals manufactured, used, or stored inside the workplace and the hazardous chemicals discharged from the workplace or stored as chemical waste.

The Akron Health Commission is charged with administration and enforcement of the ordinance. The commission is first directed to compile a master list of hazardous chemicals including all of the chemicals listed in (1) OSHA's list of Toxic or Hazardous Substances, at 29 C.F.R. 1910. Subpart Z: (2) the United States Department of Transportation's Hazardous Materials Table, 49 C.F.R. § 172.101; (3) the American Conference of Governmental and Industrial Hygenists' list entitled "Threshold Limit Value for Chemical Substances and Physical Agents in the Workplace;" (4) the International Agency for Research on Cancer's sublist entitled "Substances found to have at least sufficient evidence of carcinogenicity in animals;" and (5) the National Toxicology Program's list of chemicals published in the annual report on carcinogens.

Under the ordinance, employers are required to post signs notifying employees that they have a right to information from their employers regarding the toxic or hazardous effects of the chemicals and the circumstances under which these effects may be produced. Employers are also required to ensure that each container of hazardous chemicals in the workplace is labeled, tagged, or marked: (1) with the chemical name, if not a trade secret; (2) with the Department of Transportation's re-

quired labels for substances it regulates; (3) with a cancer warning for all materials that pose a cancer hazard; and (4) with warnings for materials which pose a reproductive hazard.

The ordinance also imposes employer filing and reporting requirements. Each January, employers are ordered to file with the Health Department a list of all work areas where hazardous chemicals are manufactured, used, or stored, specifying by chemical name all such chemicals in each work area. Furthermore, employers must immediately report to the Health Department informamation concerning any spill, leak, discharge, or emission of any hazardous substance which is required to be reported to or filed with any federal or state agency under applicable law.

Employers are required to obtain or develop a material safety data sheet (MSDS) for each hazardous chemical which they manufacture, use, or store. Each MSDS must contain, among other things, the following information: (1) the identity used on the label and, except as necessary to protect trade secrets, whether the chemical is a single substance or a mixture which has been tested as a whole to determine its hazards, its chemical and common names; or, if the hazardous chemical is a mixture, the chemical and common names of all ingredients; and the chemical and common names of all ingredients set forth on the master list which have been determined to be physical hazards; (2) the physical and chemical characteristics of the hazardous chemical, including its potential for fire, explosion, and reactivity; (3) the known acute and chronic health effects of exposure to the hazardous chemical; (4) the primary route of entry and permissible exposure limit for hazardous chemicals; (5) any precautions for safe handling and use which are known to the employer or preparer; (6) any control measures which are known to the employer or preparer; and (7) emer-

gency and first aid procedure. A MSDS is required to be updated within 90 days of the employer obtaining new and significant information regarding the health hazard of a chemical. Employees are entitled to be given a copy of a MSDS upon request.

The ordinance requires that employers maintain an employee training and education program designed to provide employees who may be exposed to hazardous substances or mixtures the information necessary to understand their hazards. Training must also include the hazard communication methods used by the employer, appropriate work practices, protective measures, emergency procedures, and the methods employees may use to receive information under the ordinance.

In addition to enforcing the ordinance, the commission is charged with the obligation of forwarding all information to the Fire Department pertinent to the performance of its duties. A provision also speaks to the protection of trade secrets.

The final substantive provision enumerates employee rights under the ordinance, including the employee's right to receive requested information, protection from discharge for filing a complaint, requests for inspection by the Health Commission, and the right to maintain a private cause of action for violations of the ordinance.

B. *The OSH Act and The Hazard Communication Standard*

Section 6 of the OSH Act directs the Secretary of Labor to promulgate occupational safety and health standards to further the purpose of the Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . ." 29 U.S.C. § 651(b). To that end, the Secretary of Labor has established the Hazard Communication Standard,

pursuant to 29 U.S.C. § 655(b)(7), and set forth at 29 C.F.R. § 1910. The relevant history of the promulgation of this standard began in 1974, when the National Institute for Occupational Safety and Health, an agency created by section 22 of the OSH Act, 29 U.S.C. § 671, recommended that the Secretary promulgate a standard requiring employers to inform employees of potentially hazardous materials in the workplace, 47 Fed. Reg. 12095 (1982). Later that year the Secretary appointed an advisory committee to develop standards for implementation of the statutory provision requiring labels or other appropriate forms of warning. That advisory committee issued its report on June 6, 1975, recommending a classification of hazards, the use of warning devices such as labels and placards, disclosure of chemical data, and employee training programs. *Id.* at 12096.

On January 16, 1981, OSHA published a notice of proposed rulemaking entitled "Hazards Identification." 46 Fed. Reg. 4412-53. This initial proposal was withdrawn by the Secretary on February 12, 1981, for further consideration of regulatory alternatives, 46 Fed. Reg. 12214. On March 19, 1982, a notice of proposed rulemaking entitled "Hazards Communication" was published, 47 Fed. Reg. 12091.

The standard was published in its final form on November 25, 1983, 48 Fed. Reg. 53280. It requires that chemical manufacturers and importers "evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous." 29 U.S.C. § 1910.1200(d)(1). It refers to several compilations of toxic materials. These lists establish certain toxic substances which chemical manufacturers or importers must treat as hazardous. *Id.* at § 1910.1200(d)(3). Chemicals not included in the designated compilations must be evaluated to determine if they are hazardous by reference to "available scientific evidence." *Id.* at § 1910.1200(d). A

manufacturer or importer of hazardous chemicals must "ensure that each container . . . leaving the workplace is labeled" with the chemical identity, with appropriate hazard warnings, and with the name and address of the source. *Id.* at § 1910.1200(f)(1). Manufacturers or importers must also prepare a material safety data sheet (MSDS) containing the chemical common names of each hazardous ingredient, and information necessary for safe use of the product. *Id.* at § 1910.1200(g). The MSDS must be provided to each employer in the manufacturing sector (SIC Codes 20-39) purchasing a hazardous chemical. That employer must in turn make the MSDS available for employee inspection, *id.* at § 1910.1200(g)(8). and "shall provide employees with information and training on hazardous chemicals in their work area . . . ." *Id.* at § 1910.1200(h). The rule allows an exception from the labeling and MSDS ingredient disclosure requirements when a chemical manufacturer or importer claims that the chemical identity is a trade secret, *id.* at § 1910.1200(i), and sets forth the procedure for disclosure of trade secrets when necessary. *Id.*

The rule provides expressly that

> [t]his occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject.

29 C.F.R. § 1019.1200(a)(2).

II.

The supremacy clause of article VI of the Constitution is the source of the federal doctrine of preemption of state law. Under the supremacy clause, federal preemption may occur in a number of ways. Preemption can be express or implied, "explicitly stated in the statute's lan-

guage or implicitly contained in its structure and purpose," *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). First, when acting within constitutional limits, Congress is empowered to preempt state law by so stating in express terms. *Id.* at 525. In the absence of express preemptive language, Congress' intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation, *Hillsborough County, Fla. v. Auto. Med. Labs.*, 105 S. Ct. 2371, 2375 (1985). Preemption of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject." *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Moreover, the Supreme Court has repeatedly held that state laws can be preempted by federal regulations as well as by federal statutes. *Hillsborough County*, 105 S. Ct. at 2375.

In the present case, two of these "varieties" of preemption are alleged: express congressional preemption and express agency preemption.

A. *Preemption by Congress*

Plaintiffs contend that the Akron ordinance has been expressly preempted by Congress in the OSH Act. The

Act does provide that once the Secretary of Labor has promulgated a standard, states are expressly preempted from regulating in that field except pursuant to section 18:

> (a) Nothing in this Chapter shall prevent any state agency or court from asserting jurisdiction under state law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.
>
> (b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667. The courts which have addressed the question have found that state "Right to Know" statues are preempted by the Hazard Communication Standard as applied to employers in SIC Codes 20-39. *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587, 593 (3d Cir. 1985).

Plaintiffs argue that since states are preempted from regulating once OSHA issues a standard, a state's political subdivisions are necessarily precluded as well. Because political subdivisions are simply extensions of the state, which derive their power from the state, preemption must extend to these agencies of the state. Defendants, on the other hand, rely on the definition of state set forth in the OSH Act as section 3, where state is defined to "[include] a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands," 29 U.S.C. § 652(7). Defendants point

out that Congress could easily have defined "states" to include their political subdivisions if it wished to preclude local regulation.

Plaintiffs also argue that because section 3 provides that the term "state" *includes* a State of the United States, etc., that the use of the word "includes" indicates that Congress foresaw an expansive reading of the term "state." In this regard, plaintiffs rely on *Mayor of Boonton v. Drew Chemical Corp.*, 621 F. Supp. 663 (D. N.J. 1985), where the court addressed whether municipalities could recover under the Comprehensive Environmental Response. Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601, *et seq.* In CERCLA, as in the OSH Act, state is defined to "include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction," 42 U.S.C. § 9601(27). Nevertheless, the *Drew* court held that since Congress employed the term "include," the definitional section explicitly contemplated an expansion of the illustrative list by the courts to the fullest extent, 621 F. Supp. at 666.

The trial judge rejected plaintiffs' position. As to the first argument, that "states" necessarily includes their political subdivisions, the trial court pointed out that in numerous other statutes, Congress has expressly preempted "states and their political subdivisions" from regulating. *See, e.g.*, Clean Air Act Amendments of 1977, 42 U.S.C. § 7543 (1982); Medical Device Amendments of 1976, 21 U.S.C. § 360k (1982); Poison Prevention Packaging Act, 15 U.S.C. § 1476 (1982); Lead-Based Paint Poison Prevention Act, 42 U.S.C. § 4846 (1982); Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1920(a) (1982); Egg Products Inspection Act, 21

U.S.C. § 1052(a) (1982); Consumer Products Safety Act, 15 U.S.C. § 2075 (1982); Flammable Fabrics Act, 15 U.S.C. § 1203 (1982). In addition, other portions of the OSH Act refer to "states and their political subdivisions." *See* § 655(b)(1) (Secretary may promulgate standards based upon information submitted by a political subdivision); § 667(c)(6) (an approved state plan must assure the Secretary that the state will establish an occupational safety and health program protecting employees of political subdivisions); § 673(b)(2) (Secretary may make grants to political subdivisions for development and administration of statistical programs). Based on Congress' practice of explicitly preempting political subdivisions and the fact that political subdivisions are referred to in other sections of the OSH Act, the trial court concluded that Congress did not simply overlook including political subdivisions or that it implicitly included them in the word "state." We concur in the trial court's conclusion.

We also reject plaintiffs' second argument premised on *Drew*. The *Drew* court expansively defined "state," finding such a reading to be consistent with Congress' intent and with the remedial intent of CERCLA:

> It would be anomalous for this far reaching remedial statute to give states a cause of action for damages to natural resources owned by the State but for it to exclude cities from access to such a cause of action while expressly including resources owned by "local governments" within the scope of the protected subject of § 9607(a)(4)(C). As I have previously noted in my June 24 ruling, CERCLA should be given a broad and liberal construction.

621 F. Supp. at 666. Thus, the *Drew* court identified several reasons not present here for reading the term "state" expansively so as to give municipalities a claim for relief under CERCLA, not the least of which was

that resources owned by local governments were protected under the Act.

We would also point out that if the term "state," as used in section 18 to preempt state regulations in the absence of an approved state plan implicitly includes political subdivisions as plaintiffs urge, then political subdivisions should also be able to regulate by submitting a "state" plan and obtaining the Secretary's approval. Otherwise, plaintiffs' argument would result in the word "state" having two different and distinct meanings at the same time.

The legislative history of section 3 gives no indication that regulation by political subdivisions was contemplated by Congress. When introducing the section which contains the definition of "state," Senator Javits of New York stated:

> Mr. President, the *sole purpose* of this amendment is to make eligible to file what is called a State plan those territories and possessions of the United States which are spelled out in the amendment. This matter is not otherwise defined in the bill.

Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Health and Safety Act of 1970*, at 504 (1971) (emphasis added). The only expansive reading indicated by the legislative history would be that which would encompass "territories" and "possessions" within the definition.

Plaintiffs also argue that because municipalities are not sovereigns, but are merely agencies of the state, they cannot regulate where the state is precluded from regulating. Plaintiffs' reliance on authorities relating to other fields of law and on cases discussing the nature

and source of municipal power to legislate is simply not persuasive in the context of preemption analysis.[3]

Plaintiffs additionally urge that *express* congressional intent to preempt local regulation can be found in Congress' desire to achieve uniformity of regulation. While acknowledging that Congress' primary intent in enacting the OSH Act was worker safety, plaintiffs argue that a further purpose, that of uniformity, may be discerned in certain provisions of the OSH Act and in comments made by the drafters of the Act. They submit that the Act's authors felt that uniformity would be necessary to promulgate an effective national standard and to avoid undue burden on interstate commerce.

Congress declared the purpose of the OSH Act in section 2:

> The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several states and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . .

29 U.S.C. § 651(b). In *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1980), the Supreme Court stated that "[w]hen Congress passed the Occu-

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[3] For instance, plaintiffs and *amici* argue that in constitutional analysis, political subdivisions are automatically encompassed within the term "state" for purposes of "state action" under the fourteenth amendment and other constitutional provisions. While this is so, political subdivisions are *not* included within the meaning of "state" under the eleventh amendment. *Mt. Healthy Board of Education v. Doyle*, 427 U.S. 274, 280 (1976). Moreover, in *Mt. Heathy*, the Court distinguished Ohio cities and counties, as "political subdivisions," from other types of governmental agencies which are mere "arms of the state." *Id.*

pational Safety and Health Act in 1970, it chose to place pre-eminent value on assuring employees a safe and healthful working environment, limited only by the feasibility of achieving such an environment." *Id.* at 540.

Congress also set forth the considerations to be weighed by the Secretary when devising standards under the Act:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

§ 655(b)(5).

While the legislation and its history do illustrate that a national standard was felt to be essential to achieve the goals of the Act, they also indicate that this was to assure that the states would at least meet the minimum requirements of the federal standards, and not attempt to undercut each other. This conclusion is well supported by legislative history of section 18:

> Moreover, whenever a State wishes to assume responsibility for developing or enforcing standards in an area where standards have been promulgated under this act, the State may do so under a state plan approved by the Secretary of Labor. The plan must contain assurances that the State will develop and enforce standards at least as effective as those developed by the Secretary, that the State will have the legal authority, personnel and funds necessary to do the job, and that a right of entry into workplaces is provided. . . . In addition, the plan must contain assurances that the State will, to the extent possible under its law, establish and maintain an occupational safety and health program applicable to all employees of the State and its political subdivisions, and that such program will be as effective as that applicable to provide employers covered by the plan.
> . . . .
>
> As an encouragement for State action, the bill provides Federal financial support to assist the States in assuming their own programs for worker health and safety. Planning grants with up to 90 percent Federal participation, and program grants with up to 50 percent Federal participation are provided.
>
> The 90 percent grant is designed to aid the States in identifying needs, developing State plans and programs for collecting statistical data, increasing personnel capabilities, and improving administration and enforcement. The 50 percent Federal grant is made available to assist States in carrying out the occupational safety and health programs contained in their plans, as well as programs concerning occupational safety and health statistics.

S. Rep. No. 1282, 91st Cong., 2d Sess., reprinted in U.S. Code Cong. & Ad. News, 5194-95 (1970). This same Senate Report discusses the preemptive effect of the OSH

Act. Political subdivisions are not mentioned in any regard.

In short, we cannot accept plaintiffs' contention that Congress expressly preempted local regulation by these provisions establishing a national standard. Furthermore, we agree with the trial court to the extent that express preemption, by definition, must be clearly manifested, especially when local health and safety provisions are endangered. *Jones*, 430 U.S. at 525. There is, in fact, little in the legislation or its history to indicate Congress' intent as to whether state preemption includes preemption of local acts as well.

B. *Preemption by OSHA Regulations*

Our inquiry does not end with devining congressional statutory intent, however, since state (or local) laws can be preempted by federal regulations as well as by federal statutes. *Hillsborough*, 105 S. Ct. at 2373. We must therefore determine whether the agency itself preempted local regulation when it promulgated the Hazard Communication Standard. We conclude that it did.

The Hazard Communication Standard is self described as a comprehensive hazard communication program:

> (2) This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject. Any state which desires to assume responsibility, in this area may do so only under the provisions of section 18 of the Occupational Safety and Health Act (29 U.S.C. 651 et seq.) which deals with state jurisdiction and state plans.

29 C.F.R. § 1910.1200(a)(2). Once again, we are faced with the term "state" and its meaning as intended by

OSHA. This time, however, some guidance has been provided.

In the preambles to both the proposed regulations and the final regulations, OSHA made evident its intent to preempt both state and local regulations. For instance, in the final regulations, while making clear that the primary intent of the standard was to protect employees, the agency also noted:

> Another reason many participants in the rulemaking support the need for a Federal standard is the recent proliferation of state and local right-to-know laws. Most companies in the manufacturing sector have business dealings which involve interstate commerce, and are thus subject to numerous different and potential conflicting regulations.

48 Fed. Reg. 53,283 (1983).

> Approximately twelve states and six local governments have some type of regulation related to the identification of hazardous substances. About thirteen other states and three other local governments have introduced proposed legislation either in this legislative session or in previous sessions. They cover different lists of substances, have different reporting requirements, serve different purposes, have different labeling and material safety data sheet requirements, and have different educational and training requirements.
>
> . . . .
>
> The potential for conflicting or cumulatively burdensome State and local laws has been acknowledged by industry representatives to be immense. As stated above, this subject was cited in many comments submitted prior to the hearing, in presentations made during the hearings, and in post-hearing comments.

> By promulgating a Federal standard, OSHA is in a position to reduce the regulatory burden posed by multiple state laws. In the final standard, OSHA preempts State laws which deal with hazard communication requirements for employees in the manufacturing sector, except in those States with a State plan which have a standard that regulates in this area.

Id. at 53,284.

The trial court refused to give effect to OSHA's intention to preempt as set forth in the preamble for two reasons. First, citing *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), the court determined that it was prohibited from relying on the preamble in order to construe OSHA's intent in § 1910.1200(a)(2). This court ruled that express preemption found outside the text of the regulations was not effective.

Brown, however, is not controlling. The regulations under review in *Brown* were essentially treated by the agency as interpretative rules, and interested parties were not afforded the notice of proposed rulemaking required by substantive rules under the Administrative Procedures Act, 5 U.S.C. § 553(b). Because the regulations were not properly promulgated as substantive rules, and therefore were not the product of procedures which Congress prescribed as necessary prerequisites to give a regulation the binding effect of law, they could not be relied upon. 441 U.S. at 315.

Here, there is no question as to whether the regulations were validly promulgated. Moreover, both the proposed and final regulations, along with the preambles indicating OSHA's intent to preempt state and local laws, were published, and thus interested parties were given notice. In *Fidelity Federal Savings & Loan Assn. v. De La Cuesta*, 458 U.S. 141, 158 (1981), the Court made clear that the preamble to a regulation is valid evidence of the administrative construction of the regulation.

The trial court rejected *De La Cuesta*, stating that the preamble cannot have preemptive effect. We need not decide whether this is a correct ruling or not since the preamble here only stands as evidence of OSHA's intent as to the regulation which expressly states its comprehensive effect. In other words, we look to the preamble only after it becomes clear that OSHA intended the regulation to have preemptive effect: the preamble does not establish that intent, but only assists in determining the scope of OSHA's "comprehensive" standard.

The second reason the trial court gave for rejecting OSHA's attempt to preempt both state and local regulations was that such preemption would not be within OSHA's authority. Relying on the structure, provisions, and legislative history of the OSH Act, the trial court concluded that Congress intended that the law of political subdivisions should not be expressly preempted. Since OSHA's attempt to extend the preemptive effect of its regulations to localities, when localities are not expressly preempted by section 18 of the OSH Act, contradicted Congress' intent as construed by the trial court, the court held that the regulations could not operate to preempt the Akron ordinance.

The trial court was correct that OSHA may not preempt local law if that position is inconsistent with clearly expressed congressional intent. Nevertheless, as indicated above, we have been able to find no indication of congressional intent on this question. And if Congress has not directly addressed the precise question at issue, or the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's action is based on a permissible construction of the statute. *Chevron, U.S.A. Inc. v. Natural Resources Division*, 467 U.S. 837, 843 (1984).

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules

to fill any gap left, implictly or explicitly, by Congress." *Id.* (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

467 U.S. at 843-44. The Court has long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by the Court whenever decision as to the meaning or reach of a stautory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Id.* at 844 (citations omitted).

Thus, if the choice made by the agency represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned. *Id.* at 845. The responsibility for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches." *Id.* at 866 (citing *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

OSHA's desire to achieve uniformity, when not charged by Congress with such a goal, does not undercut the preemptive effect of the regulation. OSHA could legitimately determine that uniformity would aid in the administration and enforcement of, and compliance with, its standard. In other words, we cannot assume that OSHA has, in violation of its statutory mandate, put the desire for uniformity, i.e., minimizing the burden on commerce, ahead of its mission to provide a safe and healthful workplace. The regulations do not suggest that this is the case. In the absence of any clearly expressed congressional intent to the contrary, and giving OSHA the deference to which it is entitled, we hold that the Hazard Communication Standard preempts local regulation in SIC Codes 20-39.

III.

Because of the nature of the trial judge's disposition of this case, she did not reach the question as to whether the entire ordinance is preempted. It is clear that the ordinance is preempted to the extent that it attempts to regulate employee safety in the workplace in SIC Codes 20-39. However, the ordinance also had as its purpose protection of the public and the providing of information to city fire fighters and public health officials regarding toxic and hazardous substances. It must also be determined whether the preemption provisions may be severed from the balance of the ordinance.

We decline to make the determinations for the first time on appeal. Rather, we will remand this matter to the district court to determine which portions of the ordinance are preempted and whether those portions that are not preempted are severable.

Accordingly, the judgment of the district court is REVERSED and this matter is REMANDED to the district court for further consideration consistent with this opinion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C85-3658A

OHIO MANUFACTURERS' ASSOCIATION, *et al.*,
Plaintiffs

vs.

CITY OF AKRON, *et al.*,
Defendants

MEMORANDUM AND ORDER

[Filed February 7, 1986]

ALDRICH, J.

This case is before the Court on an expedited basis following the December 5, 1985 issuance of a Temporary Restraining Order enjoining defendants from enforcing Akron, Ohio Codified Ordinnaces ch. 1830 ("Chapter 1830" or "the Akron ordinance"), entitled "Hazardous and Toxic Substances," on its effective date of December 17, 1985.[1] Plaintiffs are the Ohio Manufacturers' Association, a non-profit membership association representing sixty-one employers in the City of Akron which are classified within Standard Industrial Classification ("SIC") Codes 20 through 39, and Akron Selle Company, an Akron contract metal stamping company employing twenty persons and classified within SIC Code 34.[2] Defendants

[1] The parties agreed to abide by the terms of the temporary restraining order until plaintiffs' motion for a preliminary injunction was resolved by this Court. Subsequently they agreed to consolidate the resolution of the motion with a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2).

[2] SIC Codes 20 through 39 consist primarily of categories of manufacturers as set forth in the Standard Industrial Classifica-

are the city of Akron; Akron's Health Commission; Akron's Health Department; C. William Kech, M.D., Director of Health; and Harold K. Stubbs, Director of Law. The latter four defendants share responsibility for the enforcement of Chapter 1830. Nine Akron community groups have been permitted to file a brief as *amici curiae*.[3]

The complaint summarizes the plaintiff's claims:

> The basis for plaintiffs' action is that Chapter 1830 1) violates the Supremacy Clause of the United States Constitution in that it conflicts with and has been preempted by the Occupational Safety and Health Act (hereinafter "OSH Act"), 29 U.S.C. §651 *et seq.*, and the Hazard Communication Standard promulgated pursuant to the OSH Act, 29 C.F.R. § 1910.1200; 2) violates the Commerce Clause of the United States Constitution in that it constitutes an excessive and undue burden on interstate commerce; and 3) violates Article XVIII, Section 3, of the Ohio Constitution in that certain applications of it conflict with and have been preempted by Ohio Revised Code Section 3745.05(D)(3).

Subsequent to oral argument on January 17, 1986, the parties stipulated a dismissal of the third cause of action. However, plaintiffs still seek a declaration that Chapter

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tion Manual published by the U.S. Office of Management and Budget.

[3] The *amici curiae* participating in the brief are the Akron Catholic Commission; the Akron-Medina County Labor Council, AFL-CIO; Council of Block Club Presidents; International Chemical Workers Union, AFL-CIO; Ohio Public Interest Campaign; Opportunity Parish Ecumenical Neighborhood-Ministry ("OPEN-M"); United Rubber Workers, Local 2 Retirees; United Rubber, Cork, Linoleum & Plastic Workers of America; and Akron Summit Community Action Agency. Many of these organizations were active in the sponsorship, drafting, and review of the Akron Ordinance. All assert that their constituencies will be affected by the resolution of this case. Brief of *Amici Curiae* at 2-6.

1830 is unconstitutional both on its face, and as applied to certain employers.

Upon consideration, and for the reasons set forth below, the plaintiffs' motion is denied, and judgment is entered for the defendants.

Jurisdiction is based upon 28 U.S.C. § 1331 (1982).

I.

A.

Akron's "Right-to-Known" ordinance, No. 771-1984, is designated "Chapter 1830: Hazardous and Toxic Substances." Its preamble indicates that the ordinance was promulgated to protect workers, firefighters, other public officials, and the public against the dangers of toxic substances used in Akron workplaces. Chapter 1830 is applicable to employers within the City of Akron which are categorized by the enumerated Standard Industrial Classification Codes ("employers"). §§ 1830.01, 1830.03 (i). Among explicitly exempted employers and substances are federal, state, and local governments and their units (not including Akron itself) laboratories, goods transported through Akron, consumer products and food intended for consumption by the general public, and *de minimis* amounts of hazardous substances. § 1830.02. The "hazardous chemicals" regulated by the ordinance are designated in a master list to be produced by Akron's Health Commission in accordance with a minimum list established by Chapter 1830. §1830.05. The Health Commission is appointed administrator and enforcement agent of the ordinance. § 1830.04.

Chapter 1830 requires employers to label each container of hazardous material with its chemcial name, any applicable Department of Transportation labels, and cancer and reproductive warnings when appropriate § 1830.07(a). Placard or signs may replace labels when

stationary containers within a work area have the same hazards, or when labels are susceptible to damage. §§ 1830.07(b), (c).

Each employer is mandated to either obtain or create a material safety data sheet ("MSDS") for each hazardous chemical it uses, manufactures or stores. The MSDS for chemicals not classified as trade secrets must report relevant health and safety information, including chemical and common names of ingredients, physical and chemical characteristics, known acute and chronic health effects of exposure, primary routes of entry, permissible exposure limits established by the Occupation Safety and Health Administration ("OSHA"), precautions for safe handling and use, control measures, and emergency and first aid procedures. § 1830.10(a). Employees who request to see an MSDS shall be provided with a copy by their employers by the end of the next weekday following the request. § 1830.10(b). Processors, users or storers of hazardous chemicals who have not been provided with an MSDS by their suppliers or manufacturers must take prescribed steps to procure a copy following an employee request. § 1830.10(d).

Employers governed by Chapter 1830 who manufacture, use, or store hazardous substances must establish workplace training programs for their employees. § 1830.06(b). These programs must explain the hazards of chemicals to which employees are exposed; the employer's method of hazard communication; appropriate work practices and protective measures; and emergency procedures. § 1830.11(a). Employees shall also be informed of their rights to receive information on hazardous chemicals in their workplace, to request an inspection of the workplace, and to be free from retaliatory discharge, discipline, or other discrimination for exercising a Chapter 1830 right. §§ 1830.11(b), 1830.15.

Each January, employers subject to the ordinance are required to file a list of all work areas in the workplace which contain hazardous chemicals. § 1830.09(a)(1).

Any spill, leak or emission of a toxic substance which must be reported to a federal or state agency pursuant to applicable law must also be reported to Akron's Health Commission designee immediately. § 1830.09(a)(2).

Temporary variances, subject to renewal, to the labeling provisions of Chapter 1830 may be obtained upon either a showing of undue or unnecessary hardship for a specific employer, workplace, or work area, or for a pre-existing program in substantial compliance. §1830.08(a). Trade secret protection is also available to employers upon special showing. A specific chemical name of an eligible substance may be withheld if its properties and effects are disclosed upon the MSDS and if it is not a designated carcinogen. § 1830.14(a). However, an employer cannot refuse to provide the specific chemical identity to medical or fire personnel in an emergency, nor to an employees who is regularly exposed to the toxin who agrees to execute a confidentiality agreement. §§ 1830.14(f), (i). Upon a showing that an employee requesting the chemical identity of a substance for which trade secrecy is claimed is eligible for such information, the Director of Health's designee may subject the employer to citation. § 1830.14(n).

Enforcement of Chapter 1830 is delegated to the Health Department, the Health Commission, and the Law Director of Akron. §§ 1830.12, 1830.13. Compliance with the ordinance was required of employers of fifty-one or more employees within one year of passage, *i.e.*, December 17, 1985, and for employers of fifty or fewer employees, by June 17, 1986. § 1830.17.

B.

Pursuant to his power to promulgate standards provided in § 6 of the Occupational Health and Safety Act of 1970, 29 U.S.C. § 655 (1982) ("OSH Act"), the Secretary of Labor ("Secretary") issued an occupational

health and safety standards entitled "Hazard Communication Standard" ("Standard") on November 25, 1983. *See United Steelworkers of America v. Auchter*, 763 F.2d 728, 735 (3d Cir. 1985). The stated purpose of the Standard is "to ensure that the hazards of all chemicals produced or imported by chemical manufacturers or importers are evaluated and that information concerning their hazards is transmitted to affected employers and employees within the manufacturing sector." 29 C.F.R. § 1910.1200(a) (1985).[4] The Standard expressly intends "to preempt any state law pertaining to this subject. Any state which desires to assume responsibility in this area may also do so under the provisions of section 18 of the Occupational Safety and Health Act . . . which deals with state jurisdiction and state plans." § 1910.1200 (b).

The Standard applies to a specified class of employers who are involved in manufacturing using hazardous chemicals. Chemical manufacturers and importers are required to assess the hazards of their products; distributors must transmit relevant information with the products; and employers in SIC Codes 20 through 39 are instructed to provide information about the hazardous chemicals to exposed employees. § 1910.1200(b). Regulation of laboratories is less stringent, § 1910.1200(b)(3), and certain products, such as foods, regulated pesticides, and tobacco products, are partially or entirely exempted from regulation by the Standard. §§ 1910.1200(b)(3)-(5).

Instead of defining which chemicals are "hazardous" by the creation of a master list by OSHA or its designee, the responsibility for making hazard determinations is delegated to chemical manufacturers and importers.

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[4] Unless otherwise indicated, all regulations contained in the Standard are located in Volume 29 of the Code of Federal Regulations, in the 1985 edition.

§ 1910.1200(d). Employers are expected to make these determinations only if they choose not to rely upon the determinations of the chemical manufacturers or importers. § 1910.1200(d)(1). The Standard enumerates lists of presumptively hazardous chemicals which persons evaluating chemical dangers should consider established as hazardous. § 1910.1200(d)(3). While including some of the same lists of hazardous chemicals as those which the Akron Health Commission is required to review under the Akron ordinance when creating its master list, the Standard's lists are not identical.

The Standard mandates that chemical manufacturers, importers and distributors label hazardous chemicals with the substance's identity, "appropriate" hazard warnings, and their names and addresses. § 1910.1200(f)(1). Employers must label each container of hazardous chemicals in the workplace with the chemical's identity and hazard warnings. § 1910-1200(f)(4).

MSDS requirements are also part of the Standard. The federal regulations require a list of information similar to Akron's ordinance: chemical and common names; physical and chemical character; physical hazards; primary route of entry; OSHA permissible exposure limit; potential carcinogens; generally applicable precautions and controls; and emergency and first aid procedures. § 1910.1200(g)(2). Chemical manufacturers and importers are directed to provide MSDS's to distributors and manufacturing purchasers, § 1910.1200(g)(6), and employers are expected to make them readily accessible to employees during each work shift. § 1910.1200(g)(8).

Employers must develop written communications programs to administer the labeling, MSDS, and employee information and training requirements of the Standard. § 1910.1200(e). Employees must be informed about the availability of this written program, the require-

ments of the Standard, and the presence of hazardous chemicals in their work area. § 1910.1200(h)(1). Employee training should explain the physical and health hazards, protective measures available to employees, and the details of the hazard communications program. § 1910.1200(h)(2).

Like the Akron ordinance, the Standard makes trade secret protection available when the properties and effects of an eligible chemical are disclosed and the specific chemical identity will be made available to health professionals. § 1910.1200(i). In an emergency, a chemical manufacturer, importer, or employer must immediately disclose the chemical identity to treating health professionals without a written statement of need or an executed confidentiality statement. § 1910.1200(i)(2). In a non-emergency situation, health professionals may only learn the identity of a trade secret by submitting an elaborate written statement and an executed confidentiality agreement. § 1910.1200(i)(3).

The Chemical Hazardous Communication Standard requires chemical manufacturers, importers, and distributors to be in compliance with its provisions by November 25, 1985. Employers in the manufacturing sector must comply by May 25, 1986. § 1910.1200(j).

II.

Plaintiffs argue that Chapter 1830 is invalid as applies to employees in SIC Codes 20 through 39, since these employers are covered by the federal standard regulating hazard communication in the workplace.[5] First, they assert that Akron's ordinance is expressly preempted by 29 U.S.C. § 667 (1982) and 29 C.F.R. § 1910.1200(b)

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[5] Plaintiffs clearly are not challenging the applicability of Chapter 1830 to employers in other SIC Codes. Plaintiffs' Brief in Support of Temporary Restraining Order at 20.

(1985). Alternatively, they argue that Chapter 1830 is impliedly preempted by the goals of the OSH Act and the Standard, by Chapter 1830's "true regulatory intent," and by a conflict between the two regulations. On consideration, and for the reasons set forth below, this Court cannot agree that Chapter 1830 is expressly preempted, and it does not find any portion of the ordinance is impliedly preempted.

A. *Standards for Federal Preemption of States' Regulatory Power*

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

U.S. Const., art. VI, cl. 2. Under the preemption analysis derived from the Supremacy Clause, "[t]he purpose of Congress is the ultimate touchstone." *Metropolitan Life Insurance Co. v. Massachusetts*, —— U.S. ——, ——, 105 S.Ct. 2380, 2393 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

"Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 152-153 (1982) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Federal regulations are entitled to the same preemptive effect enjoyed by federal statutes. *Fidelity Federal*, 458 U.S. at 153-154.

Implied preemption is implicated when there is an "actual conflict" between state and federal law.

> Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Floride Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, [312 U.S. 52, 67. (1941)]. *See generally Capital Cities Cable, Inc. v. Crisp*, 467 U.S. ——, ——, 104 S.Ct. 2694, —— (1984).

Hillsborough County, Florida v. Automated Medical Laboratories, Inc., —— U.S. ——, ——, 105 S.Ct. 2371, 2375 (1985). *See also L.P. Acquisition Co. v. Tyson*, 772 F.2d 201, 207 (6th Cir. 1985).

Traditionally states have been permitted considerable latitude to regulate public health and safety pursuant to their police power. *Metropolitan Life Insurance*, —— U.S. at ——, 105 S.Ct. at 2398. To strike down a state's health and safety regulation, Congress' intent must be clearly manifested. *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 766 (1945); *see Jones*, 430 U.S. at 525.

B. *Express Preemption by the OSH Act*

Plaintiffs rest their argument that Chapter 1830 is expressly preempted upon § 18 of the OSH Act, 29 U.S.C. § 667 (1982) ("§ 18"), which provides:

> "(a) Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under Section 655 of this title.
>
> (b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards

> relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

The Secretary of Labor shall approve a state plan submitted pursuant to § 18(b) which meets the conditions listed in § 18(c). 29 U.S.C. § 667(c) (1982).

Plaintiffs argue that because the Standard regulates the area of chemical hazard communication and because Akron has not had, and cannot have, its ordinance approved by the Secretary, Akron is precluded from using Chapter 1830 to regulate such matter. They buttress their contention by citing the Secretary's regulations interpreting § 18. Title 29 C.F.R. § 1901.2 (1985) provides in relevant part:

> Section 18(a) of the Act is read as preventing any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which a Federal standard has been issued under section 6 of the Act.

The Standard itself indicates its preemptive effect:

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing section, and to prevent any state law pertaining to this subject. Any state which desires to assume responsibility in this area may only do so under the provisions of section 18 of the Occupational Safety and Health Act (29 U.S.C. 651 *et seq.*) which deals with state jurisdiction and state plans.

29 C.F.R. § 1910.1200(a)(2) (1985) ("§ 1910.1200 (a)(2)").

The courts which have considered the preemption of state right-to-know acts by the Hazard Communication

Standard have held that these state statutes are preempted as applied to employers in SIC Codes 20 through 39 on matters of workplace safety dealt with in the Standard. *Auchter*, 763 F.2d at 736, *cited in New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587, 593 (3d Cir. 1985) (New Jersey Right-to-Know Act); *Manufacturers Association of Tri-County v. Knepper*, No. 85-1027, slip op. (M.D. Pa. Dec. 12, 1985) (Pennsylvania Right-to-Know Act). Defendants, however, distinguish these cases as involving state, rather than municipal, right-to-know statutes.

Defendants' contention is that the word "state" as it is used in the preemption provisions of the OSH Act and the Secretary's regulations excludes political subdivisions such as the City of Akron. They rely upon the definition of "State" set forth in 29 U.S.C. § 652(7) (1982):

> The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

The failure to include politiical subdivisions within this definition, the defendants argue, means that Congress did not intend to preempt municipalities in § 18. The legislative history, however, demonstrates that the definition of "state" was not drafted with the intent of exempting political subdivisions from preemption. When introducing this definition as an amendment, Senator Javits of New York stated:

> Mr. President, the *sole purpose* of this amendment is to make eligible to file what is called a State plan those territories and possessions of the United States which are spelled out in the amendment. This matter is not otherwise defined in the bill.

Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History*

of the Occupational Health and Safety Act of 1970, at 504 (1971) (emphasis added). Given Senator Javits' purpose for defining "state", the definition obviously does not reflect at all upon Congress' willingness or unwillingness to preempt municipal ordinances.

Nevertheless, the absence of language regarding the preemption of laws of political subdivisions in the OSH Act is remarkable. As defendants point out, Congress has explicitly included political subdivisions in other provisions of the OSH Act 29 U.S.C. § 655(b)(1) (1982) (Secretary may promulgate standards based upon information submitted by a political subdivision); 29 U.S.C. § 667(c)(6) (1982) (an approved state plan must assure the Secretary that the state will establish an occupational safety and health program protecting employees of political subdivisions); 29 U.S.C. § 673(b)(2) (1982) (Secretary may make grants to political subdivisions for development and administration of statistical programs). Furthermore, countless federal regulatory statutes contain preemption provisions which explicitly include political subdivisions. *See, e.g.*, Clean Air Act Amendments of 1977, 42 U.S.C. § 7543 (1982), Medical Device Amendments of 1976, 21 U.S.C. § 360k (1982); Poison Prevention Packaging Act, 15 U.S.C. § 1476 (1982); *Lead-Based Paint Poison Prevention Act*, 42 U.S.C. § 4846 (1982); Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1920(a) (1982); Egg Products Inspection Act, 21 U.S.C. § 1052(a) (1982); Consumer Products Safety Act, 15 U.S.C. § 2075 (1982); Flammable Fabrics Act, 15 U.S.C. § 1203 (1982).[6] Congress' practice of explicitly

[6] In their brief, plaintiffs cite *Rollins Environmental Services, Inc. v. Parish of Saint James*, 775 F.2d 627 (5th Cir. 1985), and *Warren County v. State of North Carolina*, 528 F. Supp. 276 (E.D.N.C. 1981), for the proposition that federal regulations preempting state law also preempt the laws of political subdivisions. Defendants correctly respond that these cases interpreted § 18 of the Toxic Substance Control Act, 15 U.S.C. § 2617(a)(2)(B)

preempting political subdivisions, then, militates against the inferences that Congress either forgot to include political subdivisions in § 18 or implicitly included them in the word "state".[7]

The purposes of the OSH Act also support the conclusion that § 18 does not include political subdivisions. The statute provides:

> The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. . . .

29 U.S.C. § 651(b) (1982). This overriding purpose of the OSH Act is exhaustively documented. *See e.g.*, S. Rep. No. 1282, 91st Cong., 2d Sess., *reprinted in U.S.*

(1982), which specifically preempts laws of a "State or political subdivision of a State."

[7] The absence of discussion of the preemption of the laws of political subdivision in the 1277-page legislative history of the OSH Act also undermines the assertion that Congress meant to expressly include political subdivisions in the preemption provision.

At oral argument, plaintiffs proffered the Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution as an example of language which has been interpreted to apply to localities as well as states, although words denoting political subdivisions do not appear in the text. Plaintiffs might just as aptly point out that the First Amendment applies to the states, although it purports to limit the activities of Congress. These examples of constitutional interpretation are inapposite to determine whether "Congress' command is explicitly stated in the statute's language." *Jones*, 430 U.S. at 525. Plaintiffs' argument, in the words of defendants' counsel, "asks the Court to find express what is not express." The doctrine of express preemption by its terms requires strict construction, rather than the expansive construction routinely applied to constitutional provisions.

Code Cong. & Ad. News 5117 (1970); McClintock, *Foreword*, and Meeds, *A Legislative History of OSHA*, 9 Gonz. L. Rev. 317, 327 (1974).

Plaintiffs argue, however, that another important goal of the OSH Act was "to establish healthy work environments in a uniform way with minimum burden on interstate commerce." Plaintiffs' Brief in Support of Temporary Restraining Order at 22. The Third Circuit Court of Appeals has acknowledged that a desire to reduce regulatory burdens is apparent in the Standard, but it concluded:

> That purpose is arguably at odds with congressional intention that the OSH Act provide a federal floor for safety in the workplace. Reduction of burdens posed by mulitple state laws does not appear to have been a significant congressional concern; rather, Congress favored a uniform federal law so that those states providing vigorous protection would not be disadvantaged by those that did not. Subcomm, on Labor of the Sen. Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, Pub.L. No. 91-596, at 144, 413, 444 (1971).

Auchter, 763 F.2d at 734. *See also Hughey*, 774 F.2d at 593. This viewpoint is shared by at least one commentator, who dismissed the argument that the OSH Act intended to minimize regulatory burdens:

> Inconvenience to employers is an invalid objection, because Congress did not intent to protect employers' convenience. If it had, Congress would have preempted all state standards.

Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 Va. L. Rev. 1429, 1431, 1457-1458 (1984).

In a different context, the Supreme Court has ruled that the OSH Act's purpose was to provide protection to workers, despite high costs to business. In *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1981), the Court construed § 6(b)(5) of the OSH Act, which provides in pertinent part:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. . . .

29 U.S.C. § 655(b)(5) (1982). In order to reach its holding that this provision required the Secretary to conduct a feasibility analysis rather than a cost-benefit analysis, the Court found that Congress placed "the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable." *Id.* at 509. This holding was mandated by the Court's lengthy and painstaking review of the legislaitve history of the OSH Act:

> The congressional Reports and debates certainly confirm that Congress meant "feasible" and nothing else in using that term. Congress was concerned that the Act might be thought to require achievement of absolute safety, an impossible standard, and therefore insisted that health and safety goals be capable of economic and technological accomplishment. Perhaps most telling is the absence of any indication whatsoever that Congress intended OSHA to conduct its own cost-benefit analysis before promulgating a toxic material or harmful physical agent standard. *The legislative history demonstrates conclusively that*

> *Congress was fully aware that the Act would impose real and substantial costs of compliance on industry, and believed that such costs were part of the cost of doing business.*

Id. at 514 (emphasis added). The Court concluded, "When Congress passed the Occupational Safety and Health Act in 1970, it chose to place pre-eminent value on assuring employees a safe and healthful working environment, limited only by the feasibility of achieving such an environment." *Id.* at 540.[8]

The conclusion that worker safety, rather than a concern about regulatory burden created by inconsistency, motivated Congress to pass the OSH Act is substantially supported by legislative history, academic commentary, and the OSH Act itself. Section 18 of the OSH Act sets a federal floor on occupational health and safety that covers every state and territory of this country. With the floor established, states are free to enact more stringent requirements via a § 18(c) approved plan. *See* 29 U.S.C. 667(c)(2) (1982) (standards promulgated under approved state plan must be "at least as effective in providing safe healthful employment and places of employment as the standards promulgated under section 655. . . ."). A municipality's freedom to also promulgate higher standards would not undercut that floor, but would support the policy of creating safer workplaces.[9]

Plaintiffs advance numerous unpersuasive reasons for not interpreting Congress' purpose as one of providing

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[8] The Supreme Court's construction of the OSH Act in *Donovan* is similar to the method used by this Court. The Supreme Court contrasted other federal statutes explicitly requiring cost benefit analysis, *id.* at 510-511, and it analyzed the policy of the OSH Act to reach the decision that the word "feasible" should be strictly construed.

[9] Less stringent municipal standards would be impliedly preempted, since they would act as an obstacle to Congressional policy. *See* discussion of standards for implied preemption, *supra* at 11.

a "federal floor". They argue that legislative history demonstrates that Congress rejected the idea that the OSH Act should operate as a floor, apparently relying upon the following statement:

> Both versions of the bill allowed agreements between the Secretary and a State whereby the State could continue enforcement of its health and safety standards pending final action on the State plan. The Senate bill limited such agreements to standards which were not in conflict with Federal standards. The Senate bill also provided that a State standard which was more stringent than a Federal standard was not to be regarded as one in conflict with that Federal standard. The Senate receded.

S. Rep. No. 1282, 91st Cong., 2d Sess., *reprinted in U.S. Code Cong. & Ad. News*, at 5238 (1970). However, this Court cannot agree that Congress' failure to adopt the Senate's bill indicates an over-riding interest in uniformity, particularly in light of its willingness to permit states to enforce their own more stringent rules after the Secretary has approved their programs pursuant to § 18(b).

Second, plaintiffs argue that if the OSH Act were intended to provide only minimum protections for workers, there would be no reason for Congress to include § 18, since the OSH Act itself would accomplish that goal in the absence of state participation. The legislative history shows, however, that Congress intended to shift the enforcement of occupational health and safety regulations to the states, and that it promulgated § 18 with that intention:

> As an encouragement for State action, the bill provides Federal financial support to assist the States in assuming their own programs for worker health and safety. Planning grants with up to 90 percent Federal participation, and program grants up to 50 percent Federal participation are provided.

> The 90 percent grant is designed to aid the States in identifying needs, developing State plans and programs for collecting statistical data, increasing personnel capabilities, and improving administration and enforcement. The 50 percent Federal grant is made available to assist States in carrying out the occupational safety and health programs contained in their plans, as well as programs concerning occupational safety and health statistics.

S. Rep. No. 1282, 91st Cong., 2d Sess., *reprinted in U.S. Code Cong. & Ad. News*, at 5195 (1970). Moreover, an appellate court construing § 18 observed:

> In the application of a new federal statute, there is a likely Congressional contemplation of maximizing use of existing state machinery. "Federalism" cannot be invoked categorically where it would defeat the national objective. A sensitivity to state participation has value, however, where the state administration can be integrated with federal application—either as a supplement, or as a stopgap measure, or as a delegation under federal control.

American Federation of Labor and Congress of Industrial Organizations, Industrial Union Department v. Marshall, 570 F.2d 1030, 1037 (D.C. Cir. 1978). Given the obvious rationale for § 18, plaintiffs' contention that there would be no purpose for § 18 if the OSH Act meant to provide minimum, rather than uniform, standards is wholly untenable.

Third, plaintiffs cite the remarks of several senators in the legislative history for the proposition that uniformity was an intent when they wrote the OSH Act. The Court is not persuaded that these few statements of individual debaters indicate that the OSH Act has the subsidiary purpose plaintiffs attribute to it. Furthermore, the Court is not convinced that all of the state-

ments refer to the unfairness of regulatory burden on employers rather than the unfairness that "efforts of the more vigorous states are inevitably undermined by the shortsightedness of others." S. Rep. No. 1282, 91st Cong., 2d Sess., *reprinted in U.S. Code Cong. & Ad. News*, at 5180 (1970).

Finally, plaintiffs rely on *Township of Greenwich v. Mobil Oil Corp.*, 504 F. Supp. 1275 (D.N.J. 1981), in which the court held that the township's right to enforce its zoning ordinance and building code was not preempted by the OSH Act. Enroute to its decision that preemption of those ordinances would be contrary to Congressional intent as evidenced in the legislative history, the court stated, "We agree that if plaintiff Township sought, through the issuance of Notices of Violation, to control the working areas of defendant Mobil's refinery, plaintiff's attempt to regulate would be preempted by the Occupational Safety and Health Act." This remark was unnecessary to the resolution of the *Greenwich* case, and this Court doubts that the issue was subjected to the exhaustive briefing and argument afforded in this case. The Court, therefore, is unpersuaded by the dictum of the New Jersey district court.

Plaintiffs also cite a multitude of cases holding that preemptions of state law are to be broadly construed in order to give life to the Supremacy Clause. However, this argument ignores the fact that express preemption, by definition, must be clearly manifested, especially when local health and safety provisions are endangered. *Jones*, 430 U.S. at 525. When § 18 of the OSH Act is construed in light of its motivating purpose—worker safety—and in comparison to other federal preemptory provisions which routinely preempt the laws of political subdivisions in explicit terms, this Court cannot conclude that Congress' intent to preempt laws such as Chapter 1830 is "clearly manifested." Accordingly, this Court holds that

§ 18 does not expressly preempt Akron's ordinance, which regulates matters already regulated in OSHA's standard.

C. *Express Preemption by the Standard*

Plaintiffs urge that in the event this Court finds that the Akron ordinance is not expressly preempted by § 18 of the OSH Act, it should construe § 1910.1200(a)(2) of the Standard as expressly preempting Chapter 1830 by virtue of OSHA's language reported in the Federal Register and the Congressional Record. This Court does not agree that interpretative language which is not part of the regulation accords the Standard preemptive effect over political subdivisions. Moreover, even if such language could be construed to mean that the regulations were intended by OSHA to have preemptive effect over municipalities, this Court would not accept such an interpretation because of its obvious inconsistency with the clear Congressional policy in the OSH Act.

1.

To support its position that OSHA expressly preempts laws of political subdivisions despite § 1910.1200(a)(2)'s failure to explicitly mention them, plaintiffs rely heavily upon OSHA's preambles to interim and final drafts of the Standard. In particular, they cite OSHA's language explaining the purposes of the Standard, which explicitly states policies of uniformity. In the preamble to its regulations, OSHA states that its purpose was "to establish uniform requirements for hazard communication in one segment of industry, the manufacturing division." 48 Fed. Reg. 53281 (1983). Various statements throughout the report echo the rationale that "the promulgation of a cost-effective federal standard is likely to reduce the cost of complying with the various state and local right-to-know laws." 48 Fed. Reg. 53329 (1983). Plaintiffs identify "OSHA's strongest expression of preemptive

effect" as its explanation of the preemption language in its summary of the Standard as promulgated:

> This preemption will serve to reduce the burden on interstate commerce produced by conflicting state and local regulations and will insure that all employees in the manufacturing sector are accorded the same degree of protection. OSHA will examine carefully any state requests to regulate in this area to determine any potentially burdensome impact on interstate commerce as well as to ascertain whether there is a compelling need for separate regulation.

48 Fed. Reg. 53334 (1983).

Plaintiffs also rely upon two cases in which the Supreme Court evaluated language in preambles to regulations to decide what preemptive effect the regulations had. In *Fidelity Federal*, 458 U.S. at 141, the Court looked at the preamble accompanying a regulation promulgated by the Federal Home Loan Bank Board to resolve "any ambiguity in [the regulation's] language. . . ." In *Hillsborough County, Florida*, —— U.S. at ——, 105 S.Ct. at 2371, the Court evaluated language in the preamble of regulations promulgated by the Food and Drug Administration to determine that local regulation of the collection of blood plasma was not intended to be preempted by the agency.

However, the Supreme Court had earlier held that giving administrative language which was not within the body of the regulations the same effect as if it were part of the regulations violates the Administrative Procedure Act, 5 U.S.C. §§ 551-559. *Chrysler Corp v. Brown*, 441 U.S. 281 (1979). When asked to interpret the phrase "authorized by law" in § 7(b) of the Trade Secrets Act, 18 U.S.C. § 1905 ("§ 7(b)"), the Court refused to read "interpretive regulation of general statement of agency policy" as authorization for purposes of § 7(b). *Id.* at

315-316. It distinguished interpretive language from the substantive portions of regulations, since "such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law." *Id.* at 315 (footnote omitted). Thus, the Court found that the failure to subject interpretive language of the agency to public scrutiny during rulemaking as required by 5 U.S.C. § 553 (b) precluded reliance on this language.

In light of *Brown*, the cases relied upon by plaintiffs are distinguishable. The Court in *Fidelity Federal*, 458 U.S. at 158, n .13, recognizes the continuped vitality of *Chrysler Corp.*:

> Citing *Chrysler Corp v. Brown*, 441 U.S. 281, 315-316 (1979), appellees characterize the preamble as an interpretive regulation that does not have the binding force of law and therefore cannot pre-empt state law. But *Chrysler Corp.* is not on point because we conclude that § 545.8-3(f) itself supersedes contrary state due-on-sale law; we look to the preamble only for the administrative construction of the regulation, to which "deference is . . . clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). We need not consider, therefore, the pre-emptive effect of the preamble standing alone.

In the present case, the plain words of § 1910.1200(a)(2), without considering the preamble, will not support an inference that the Standard has a larger preemptive effect than § 18 of the OSH Act. In effect, the plaintiffs urge this Court to construe the Standard to preempt the laws of political subdivisions because of OSHA's interpretation and analysis of its regulations—precisely the case distinguished by the Court in *Fidelity Federal.*

Furthermore, plaintiffs' citation to *Hillsborough* is also inapposite. *Hillsborough* did not involve the interpreta-

tion of an ostensibly "expressly" preemptive regulation; instead, it looked to the interpretive language of an agency to determine whether its comprehensive regulation of the field was intended to preempt all state and local regulation:

> Moreover, because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt.

—— U.S. at ——, 105 S.C. at 2377. Determining whether a regulatory scheme is so exhaustive that it is meant to preempt state or local regulation in its field of law is an inexact science at best. Reliance on interpretive statements by the agency is justified by the nature of the analysis. Deciding whether preemption is express is, by its terms, a much narrower inquiry. Thus, *Hillsborough* does not require the conclusion that an agency's preamble to regulations can be read in conjunction with its pre-emption provision to find that the regulations expressly preempt local law.

Chrysler Corp., then, prohibits this Court from construing § 1910.1200(a)(2) by reading OSHA's preambles into the Standard. Plaintiffs have failed to demonstrate that *Chrysler Corp.* has been eroded, or that express preemption may be found by reading language outside the text of the regulations.

2.

Even if this Court could construe the Standard as expressly preempting the laws of political subdivisions such

as Chapter 1830, it would not agree that OSHA was within its authority when assigning the Standard such a preemptive effect. It is true that a preemptive regulation's force does not depend upon express Congressional authorization to replace state law. *Fidelity Federal*, 458 U.S. at 154. However, when reviewing OSHA's construction of the OSH Act, this Court must first consider whether Congress has already directly addressed this issue. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, —— U.S. ——, ——, 104 S.Ct. 2778, 2781-2782, *reh'g denied*, —— U.S. ——, 105 S.Ct. 28-29 (1984). The judiciary, rather than the agency, is the final interpreter of statutory meaning, and it must reject administrative interpretations which are contrary to clear Congressional intent. *Id.* at 2782, n. 9. If a court, employing traditional tools of statutory construction, decides that Congress had an intent regarding a specific issue, that intention must be given effect. *Id.*

In the present case, this Court has reviewed the structure, provisions, and legislative history of the OSH Act before concluding that Congress intended that the law of political subdivisions should not be expressly preempted. OSHA's contrary interpretation, then, is not afforded the deference due when it is filling interstices created by Congress. Since OSHA's attempt to extend the preemptive effect of its regulations to localities, which are not expressly preempted by § 18 of the OSH Act, contradicts Congress' intent as construed by this Court, the regulations cannot operate to expressly preempt Chapter 1830.

Courts have consistently refused to abrogate the clear intent of Congress, even where the rejection of an agency's actions or construction of the statute would

prove very troublesome and costly. In the celebrated "snail darter case," *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Supreme Court was urged to prohibit the completion and operation of the Tellico Dam in Tennessee because of the threat to the existence of a species of three-inch fish known as snail darters, which were protected by the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543. Although Congress had already expended more than $100 million on the nearly-built dam, the Court enjoined its completion. In doing so, it relied upon the plain terms of the statutory provision. *Id.* at 173. Although the Court's majority did not believe that it was necessary to look at the legislative history of the Endangered Species Act since the statute was plain and unambiguous on its face, *id.* at 184, n. 29, it stated:

> While there is no discussion in the legislative history of precisely this problem, the totality of congressional action makes it abundantly clear that the result we reach today is wholly in accord with both the words of the statute and the intent of Congress. The plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, whatever the cost. This is reflected not only in the state policies of the Act, but in literally every section of the statute.

Id. at 184.

As the Supreme Court in *Hill* did, this Court must enforce the decisions made by Congress when the OSH Act was promulgated over fifteen years ago. Congress clearly intended in the OSH Act to further the policies of worker health and safety, not to reduce the administrative burden on business caused by a lack of uniformity. Both the legislative history and the plain words of the statute compel the conclusion that Congress did not intend to expressly preempt laws of municipalities. Thus,

this Court must hold that § 1910.1200(a)(2) of the Standard does not expressly preempt Chapter 1830.

D. *Implied Preemption*

Since Chapter 1830 is not expressly preempted by the OSH Act, each disputed provision [10] of the Akron ordinance must be analyzed in light of the federal regulations to determine whether Chapter 1830 produces an "actual conflict," making compliance a "physical impossibility," or frustrates the federal policy of the OSH Act. *Hillsborough*, —— U.S. at ——, 105 S.Ct. at 2375. The unlikelihood of making either finding when evaluating a local regulatory standard which is more stringent than corresponding federal regulations was noted by the Third Circuit in its review of the New Jersey Right-to-Know legislation. *Auchter*, 763 F.2d at 734. Moreover, the Supreme Court has observed the incongruity of "prevent[ing] States from taking supplementary efforts" towards Congressional goals, thus "interpret[ing] federal statutes to negate their own stated purposes." *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 419-420 (1973).

1) *Exemptions*

Plaintiffs submit that some of the employers and substances exempted by § 1830.02 from regulation under the

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[10] The following provisions either are uncontested by plaintiffs or raise no plausible preemption issue:

1830.01 Application
1830.03(a)-(h), (j), (1)-(o) Definitions
1830.04 Powers and Duties of the Commission
1830.06 Hazard Determination and Communication Program
1830.08 Variances
1830.16 Sunset Provision
1830.18 Conflict and Invalidity
1830.19 Separability
1830.20 Penalties

Akron ordinance are only exempted from labeling requirements under the Standard. In addition, some substances exempted by the Standard are regulated by Chapter 1830. Complaint at ¶ 24. This discrepancy does not, however, make compliance a "physical impossibility." The OSH Act, rather than Akron, creates the federal floor on hazard communications by promulgation of the Hazard Communication Standard, so it is not necessary for Chapter 1830 to regulate all potentially hazardous substances. Further, since § 18(a) of the OSH Act reveals Congress' intention to permit states to fill interstices in federal law, Akron's regulation of substances exempted by the Standard does not frustrate the federal policy of the OSH Act, but rather contributes to the goal of worker safety.[11]

2) *Application to "Employers"*

The term "employer," characterizing the persons and entities to which Chapter 1830 is made applicable by § 1830.01, is defined as "the City of Akron and any person, firm, corporation, partnership, association or other entity in the City of Akron which is in any of the following Standard Industrial Codes (SIC): 7, 13 through 17, 20 through 39, 41, 42, 45, 48 through 50, 53, 54, 55, 70, 72, 516, 517, 7333, 7342, 7349, 75, 80, 863." § 1830.03 (i). As discussed above, this classification results in the application of Chapter 1830 to a much broader group of employers than the Standard, which is limited to the manufacturing sector. It is indisputable that this ex-

[11] This Court has accepted the premise that worker health and safety, rather than the alleviation of regulatory burdens on employers, is the policy animating the OSH Act. *See supra* at 15-20. Since any more stringent provision of the Akron ordinance will generally foster that goal, the Court will not repetitively announce that most of the provisions do not frustrate the policy of the OSH Act. Rather, consistency with federal policy will be discussed in the text only when there is a plausible argument to be weighed.

pansion of employers subject to hazard communication laws is valid.[12] *Hughey*, 774 F.2d at 593; *Knepper*, slip op. at 11-12.

3) *Determination of "Hazardous Chemicals"*

The "hazardous chemicals" which will be regulated by Chapter 1830 are defined as those contained on a list promulgated by the Health Commission pursuant to §1830.05. §1830.03(k). This "Master List of Hazardous Chemicals" ("Master List") shall include chemicals on lists developed by various governmental and research groups identifying hazardous substances, and the Commission is entitled to recommend revisions to the list. §1830.05. In contrast, substances regulated by the Standard are to be determined by chemical manufacturers and importers in accordance with the procedure set forth in §1910.1200(d). These different methods of determining which substances are toxic will probably result in different chemicals being regulated by the Standard and Chapter 1830. Nevertheless, Chapter 1830's list will not "conflict" with those chemicals requiring warnings under the Standard, but merely supplement them. *Hughey*, 774 F.2d at 594.

4) *Labeling and Placards*

Section 1830.07 mandates that each container of hazardous chemicals be labeled, or in some situations marked with a sign or placard, with its chemical name, Department of Transportation required labels, and cancer and reproductive warnings when applicable. Section 1910.1200

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[12] The Third Circuit has ordered the Secretary to consider applying the Standard to other SIC Codes and to order its application if he cannot advance reasons why that is not feasible. *Auchter*, 763 F.2d at 739. Since municipalities are not expressly preempted by § 18, however, such an expanded application of the Standard would have little, if any, effect on the validity of Akron's ordinance.

of the Standard requires that each container leaving a chemical manufacturer, importer, or distributor be labeled with the chemical's identity, "appropriate hazard warning" and the company's name and address. Employers are responsible for ensuring the labeling of the first two requirements. The Akron and federal provisions do not appear to be at all inconsistent. The Standard specifically requires labeling consistent with Department of Transportation regulations. § 1910.1200(f)(2). Furthermore, "appropriate hazard warnings" must include information on carcinogenic and reproductive risks, since such characteristics require a finding that a substance is a "hazardous chemical" under the Standard. § 1910.1200(c). There does not appear to be an actual conflict between these labeling provisions. *See Hughey*, 774 F.2d at 595-596; *Knepper*, slip op. at 18 (both cases holding that labeling requirements of a state law are not preempted by federal law except as applied to the manufacturing sector).

Plaintiffs argue, however, that the Standard's provision establishing responsibility for compiling MSDS's and its effective dates make compliance with the labeling requirement impossible for the employers for whom Chapter 1830 was scheduled to become effective in December, 1985. The Standard provides that MSDS's shall be produced by chemical manufacturers and importers and provided to distributors and manufacturing purchasers. § 1910.1200(g)(6). The Standard became effective in November, 1985 for the manufacturers and importers, and it will not become applicable to "downstream" employers until May 12, 1986. Plaintiffs assert that this six-month period between effective dates was designed to permit the downstream employers to have ample time to receive the information from their suppliers. They argue that this information may not yet be available to employers for whom Chapter 1830 was scheduled to become effective in December, 1985. Defendants cogently respond that there are other avenues for employers to obtain information

needed to comply with Chapter 1830's labeling requirements, such as requesting chemical names for substances found on the Master List from the International Union of Pure and Applied Chemistry or the Chemical Abstract Service. Moreover, there is apparently no relation whatsoever between the effective date of the Akron ordinance and the date on which the Standard would be applied. Chapter 1830 was not scheduled to become effective as to any employer until one year after its enactment. §1830.17. Certainly this passage of time should have been ample for large employers to gather the information which they are needed for compliance. The Court does not agree that the need to independently take steps to obtain information which would later become available through the operation of the Standard makes compliance with the two regulations "physically impossible." [13]

Plaintiffs wishing to contend that the labeling requirements will "confuse" workers who are bombarded with a myriad of information, must present evidence on this factual issue. *Hughey*, 774 F.2d at 596. Plaintiffs here have not done so. Accordingly, the labeling requirements of Chapter 1830 are not preempted by the Standard.

5) *Employer Filing and Reporting Requirements*

Section 1830.09 contains provisions compelling the filing of reports annually and after spillage or leakage of a hazardous chemical. Employers must also file certain construction or operating permits and pay an annual filing fee. These filings are made available to the fire department pursuant to § 1830.12(g). There are no comparable provisions within the Standard, so there are no

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[13] The Court also rejects plaintiffs' assertion that the labeling provision of Chapter 1830 frustrates the policy of the federal law by placing oneorous costs upon employers who must comply with additional labeling requirements. Worker safety is the goal which the OSH Act fostered; administrative ease is not.

actual conflicts. Moreover, since these reports can be utilized for providing information to fire and other public officials, § 1830.09 may be construed as a regulation protecting environmental, rather than workplace, health and safety.[14] A funding provision similar to that in the Akron ordinance was specifically upheld by the Third Circuit Court of Appeals because it did not "interfere with compliance with the OSH Act or impose obstacles to the accomplishment of the OSH Act's purposes." *Hughey*, 774 F.2d at 595.

6) *Material Safety Data Sheets*

Chapter 1830 requires each employer to develop or obtain an MSDS for each hazardous chemical the employer manufactures, uses, or stores. § 1830.10(a). The information it shall contain is similar, though not identical, to the MSDS's prescribed by the Standard. *See* §1830.10(b) and §1910.1200(g)(2). There is no conflict

[14] Notwithstaanding plaintiffs' characterization of the purpose of these provisions, many of these regulations protect the community as well as workers. The regularity of chemical spills and fires which destroy large areas or cause many illnesses is consistently documented by the media. Moreover, Frank Slayton of the Akron Health Department testified that the information collected pursuant to Chapter 1830 will be used to trace latent diseases; for zoning purposes (to regulate the proximity of toxic chemicals to population areas, schools, and nurseries); and to avoid contamination of the environment. Captain Charles Strum of the Akron Fire Department testified that Chapter 1830's labeling requirements would help firefighters to identify chemicals on sight and to know the location of hazardous chemicals before going to the scene of a fire. Captain Strum's affidavit confirms that such information would protect firefighters' safety and permit them to make informed evaluations about danger to the community. *But see Hughey*, 774 F.2d at 595 (recognizing that furnishing workplace surveys to firefighter and other officials implicates a "broader purpose" than the Standard, but holding such a requirement expressly preempted because New Jersey has distinguished between environmental and workplace surveys).

between the two provisions, and the Akron MSDS's will not undercut the federal policy of worker safety.

Section 1830.10(b) requires that any employee, his or her designated representative, and the Health Commission are entitled to receive a copy of the MSDS's by the close of business on the next weekday after their requests. If an MSDS is not available from a supplier, a downstream employer may be exempted from this requirement by a renewed application to the supplier within ten days of a request. In contrast, the Standard mandates that an MSDS be made available to a requesting employee within fifteen days of his or her request. §§ 1910.1200(g)(10), 1910.20(e). Obviously, an employer can comply with both regulations by providing the requested MSDS's by the end of the business day following the employee's request. Plaintiffs argue that compliance with Akron's regulation may be impossible if large companies with many MSDS's are forced to gather them within twenty-four hours. Regardless of the correctness of that assessment, implied preemption occurs when compliance with a federal law is impossible when one attempts to also comply with a competing state or local law, not because compliance with the local law itself is impossible. Instead of asserting preemption, employers in a situation where they cannot physically comply with such a rule should argue that the ordinance does not satisfy minimal due process requirements, since the regulation as applied would have no "rational relationship" with Akron's objective. *See Williamson v. Lee Optical*, 348 U.S. 43 (1955).

7) *Employer Training Program and Employee Rights*

Section 1830.11(6) requires that employers subject to the ordinance create a training program to explain the hazards of the substances to which employees are exposed; the availability and function of labels, MSDS's and any other hazard communication devices; appropriate work practice; protective measures and emergency procedures.

The components of the employee training program mandated by the Standard are substantially identical. Thus, there is no conflict which preempts the Akron provision.

Employers are also required to supply employees with a copy of § 1830.15, dealing with employee rights. § 1830.11(b). That provision guarantees an employee the opportunity to inspect, information which the employer is required by Chapter 1830 to release; protects an employee from discrimination or discipline for exercising any rights under the Chapter, and permits the commencement of legal action if rights are violated; and allows an employee to request an inspection by the enforcement agents when the employee believes there is a violation of Chapter 1830 in the workplace. § 1830.15. There are no comparable requirements in the Standard, but the facilitation of the federal worker safety goal by these provisions is obvious.

8) *Enforcement of Chapter 1830*

Section 1830.12 establishes enforcement procedures for the Health Commission and the Health Department to implement, including random inspections, investigations prompted by employee complaints, and reporting duties to the Akron City Council. The Law Director is also given authority to institute legal actions involving the Akron ordinance. § 1830.13. Plaintiffs adduce no evidence that the enforcement of Chapter 1830 by these Akron officials would impede the enforcement efforts of federal regulators. Indeed, an additional set of enforcement agents may well deter violations of the Standard as well as of Chapter 1830.

9) *Protection of Trade Secrets*

Chapter 1830 contains a carefully drafted trade secret protection provision which exempts disclosure of the specific chemical identity of eligible substances, but which

also permits otherwise protected information to be divulged to fire fighters, health professionals and exposed employees in certain situations. § 1830.14. Its trade secret provisions deviate from those of the Standard in several respects. First, the Standard does not share Chapter 1830's requirement that a chemical must be non-carcinogenic to be afforded trade secret protection. *See* 1830.14(a) and § 1910.1200(i)(1). This difference cannot be preemptive, however, since the Third Circuit has held that the Standard cannot afford broader substantive trade secret protection than state law. *Auchter*, 763 F.2d at 741.

The Standard allows exceptions to trade secret protection only for treating physicians and nurses in emergency situations, and for various medical personnel treating employees in non-emergency situations and who follow enumerated procedural steps §§ 1910.1200(i)(2) and (i)(3). Akron's ordinance permits access to trade secrets by both fire and medical personnel involved in an emergency where the information is needed for treatment or where the personnel will be exposed to hazardous chemicals, and to employees regularly exposed to the substance who execute confidentiality statements. Although the provisions of Chapter 1830 and the Standard which permit different categories of persons to have access to trade secrets appear to be inconsistent, the Third Circuit has invalidated the Standard's limitations of access to trade secret information to health professions. *Auchter*, 763 F.2d at 743. Further, permitting medical and fire personnel who are exposed to hazardous chemicals in an emergency to learn the specific chemical identity of those substances implicates a community, rather than workplace, purpose. Since plaintiffs have not demonstrated how this access to information by endangered emergency personnel presents an obstacle to the federal purposes of the Hazard Communication Standard, such provision is not preempted.

Chapter 1830 also requires that Akron's Director of Health be automatically supplied by the employer with a copy of a written request for a specific chemical identity, a copy of the written denial furnished to the requesting person, and reasons for the decision, within thirty days of a denial if this information was requested by a regularly exposed employee, or if the denial was based upon a decision that a substance has trade secret protection. §§ 1830.14(c) and (k). The Standard permits a health professional denied trade secret access to initiate a review by OSHA. § 1910.1200(i)(a). Neither the review of a denial by Akron's Health Director nor the mandatory nature of the review create a conflict with a review by OSHA. In addition, this additional reviewing procedure provided by the Akron ordinance supports the federal policy of denying access to trade secret information only where appropriate.

No other sections of § 1830.14 present preemption problems.

This Court cannot find, then, that any of the provisions of Chapter 1830 are impliedly preempted by the Standard. In fact, most of them supplement the Standard admirably. The Court now turns to plaintiffs' argument that Chapter 1830 violates the commerce clause.

III.

Plaintiffs' second cause of action alleges that the duplicative and costly nature of Akron's system for regulating hazardous chemicals communications constitutes an undue burden on interstate commerce. When presented with similar arguments, the court reviewing Pennsylvania's Right-to-Know statute responded:

> In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L.Ed.2d 174, 178, 90 S.Ct. 844, 847 (1970) the Supreme Court established the following criteria for determining whether a state statute violates the Commerce Clause:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 US 440, 443, 4 L Ed2d 852, 856, 80 S. Ct. 813, 78 ALR2d 1294.

We should also note that safety regulations are entitled to "a strong presumption of validity," *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524, 3 L. Ed.2d 1003, 1007, 79 S.Ct. 962, 965 (1959). *Kassell v. Consolidated Freightways Corp.*, 750 U.S. 662, 67 L.Ed.2d 580, 101 S.Ct. 1309 (1981).

In the instant case, the Right to Know Act operates evenhandedly and thus the relevant inquiry is whether the burden on interstate commerce outweighs the local benefit. Plaintiffs have failed to demonstrate that the Right to Know Act will substantially burden interstate commerce. While we recognize that implementation of the Act may be costly and in that sense may burden interstate commerce, we cannot conclude that the burden outweighs the benefit. As a result we find that the Right to Know Act does not violate the Commerce Clause.

Knepper, slip op. at 25-26. This Court is confronted with a similar evidentiary situation. Plaintiffs have proffered no evidence of the effect of Chapter 1830 on interstate commerce. Therefore, the extent of any impact upon interstate commerce is speculative, at best, while the benefits to Akron workers and the community are tangible and direct. Thus, this Court cannot find that the burden of Chapter 1830 upon interstate commerce is excessive in comparison to the local benefits. Since the regulation is "evenhanded," Chapter 1830 does not violate the commerce clause.

IV.

This Court concludes that Chapter 1830 (Akron's "right-to-know" ordinance) is not preempted by federal law, nor does it violate the commerce clause of the federal Constitution. Plaintiffs' motion for a preliminary injunction is denied; judgment is entered for the defendants; defendants' motion to assess costs against plaintiffs is denied.

IT IS SO ORDERED.

/s/ Ann Aldrich
ANN ALDRICH
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-3191

[Filed September 17, 1986]

OHIO MANUFACTURERS ASSOCIATION;
AKRON SELLE COMPANY,
Plaintiffs-Appellants,

v.

CITY OF AKRON, STATE OF OHIO, *et al.*,
Defendants-Appellees.

Before: MARTIN and GUY, Circuit Judges; and BROWN, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed and the case is remanded for further consideration consistent with this opinion.

It is further ordered that Plaintiffs-Appellants recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution thereof issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-3191

[Filed October 31, 1986]

OHIO MANUFACTURERS' ASSOC., *et al.*,
Plaintiffs-Appellants,
v.
CITY OF AKRON, *et al.*,
Defendants-Appellees

ORDER

Before: MARTIN and GUY, Circuit Judges and BROWN, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, this petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-3191

[Filed January 7, 1987]

OHIO MANUFACTURERS' ASSOCIATION, *et al.*,
Plaintiffs-Appellants

v.

CITY OF AKRON, *et al.*,
Defendants-Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Defendants-Appellees, the City of Akron, the Health Commission of the City of Akron, the Health Department of the City of Akron, C. William Keck as Director of Health for the City of Akron, and Harold K. Stubbs as Director of Law of the City of Akron, hereby appeal to the Supreme Court of the United States from the final judgment of this Court entered on October 17, 1986, reversing the judgment of the District Court.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Respectfully submitted,

HAROLD K. STUBBS
Director of Law

/s/ Janice E. Crossland
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ARTICLE IV, CLAUSE 2 OF THE UNITED STATES CONSTITUTION

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

THE AKRON ORDINANCE

ORDINANCE NO. 771-1984 amending and/or supplementing the Codified Ordinances of the City of Akron, Ohio, 1975, by the addition of a new Chapter 1830, entitled "Hazardous and Toxic Substances;" and declaring an emergency

WHEREAS, there are numerous chemicals used in the work places within the City of Akron which may be hazardous to employees and the public; and

WHEREAS, the City firefighters in the course of their duties frequently require information concerning toxic or hazardous substances; and

WHEREAS, the labeling of toxic and hazardous substances and the availability of information about such substances to employees, public officials and other affected persons is essential to protect the public safety and health of the citizens of Akron.

NOW, THEREFORE, BE IT ENACTED by the Council of the City of Akron:

Section 1. That the Codified Ordinances of the City of Akron, Ohio, 1975, are hereby amended and/or supplemented by the addition of a new Chapter 1830, "Hazardous and Toxic Substances" which shall read as follows:

"CHAPTER 1830

"HAZARDOUS TOXIC SUBSTANCES

"1830.01 Application.
"1830.02 Exemptions.
"1830.03 Definitions.
"1830.04 Powers and Duties of the Commission.
"1830.05 Master List of Toxic and Hazardous Substances.
"1830.06 Hazard Determination and Communication Program.

"1830.07 Labels and Placards.
"1830.08 Variances.
"1830.09 Employer Filing and Reporting Requirements.
"1830.10 Material Safety Data Sheets (MSDS).
"1830.11 Employer Training Program.
"1830.12 Enforcement Authority of the Commission and Health Department.
"1830.13 Remedies Available to Law Director.
"1830.14 Trade Secrets.
"1830.15 Employee Rights.
"1830.16 Sunset Provision.
"1830.17 Compliance Dates.
"1830.18 Conflict and Invalidity.
"1830.19 Separability.
"1830.20 Penalties.

"1830.01 APPLICATION.

"(a) This Chapter, in appropriate sections, requires employers to provide information to their employees and the designated representatives of these employees about hazardous chemicals to which these employees are exposed by means of a hazard communication program, labels, placards, work area hazardous chemical list, material safety data sheets, and information training.

"(b) This Chapter in appropriate sections, requires employers to provide information to the City's Fire Division and Health Department about the hazardous chemicals manufactured, used or stored inside the workplace and the hazardous chemicals discharged from the workplace or stored as chemical waste at the workplace by means of hazardous chemical lists, hazardous chemical discharge permits and reports and material safety data sheets, if requested.

"1830.02 EXEMPTIONS.

"(a) This Chapter shall not apply to any employer which is an educational institution, a federal, state or county government, or any department, agency, board, or commission thereof, but shall apply to the City of Akron, its agencies, departments and subdivisions.

"(b) This Chapter shall not apply to any laboratory operated by an otherwise covered employer, including research laboratories, analytical laboratories, medical laboratories, so long as the names of materials in such laboratories are available to the employees.

"(c) This Chapter shall not apply to any person or entity who employs domestic workers or casual laborers solely at a residence.

"(d) This Chapter shall not apply to hazardous chemicals in the process of being transported in, into, or through the City of Akron.

"(e) This Chapter shall not apply to substances which are consumer products, food stuffs or tobacco products, packaged for distribution to, and intended for use by, the general public. This includes any product used by an employer in the same physical form, approximate amount, concentration and manner as used by consumers, and to which, in the employer's knowledge, employee exposure is not significantly greater than that of the consumer in foreseeable consumer uses of the product.

"(f) This Chapter shall not apply to toxic or hazardous substances in containers having a volume of one gallon or less liquid, or a weight of ten pounds or less, except that such substances must be identified for the employees, and must be identified on an area list.

"(g) This Chapter does not apply to chemicals which are foods, drugs, cosmetics, or tobacco products intended for personal consumption by employees while in the workplace.

"1830.03 DEFINITIONS.

"(a) 'Chemical name' is the scientific designation in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry (IUPAC) or the Chemical Abstracts Service (CAS) rules of nomenclature for those substances listed in Section 1830.05.

"(b) 'Commission' when used in this Chapter means the Health Commission established by Section 78 of the Charter of the City of Akron.

"(c) 'Common name' means any designation of identification, such as code name, code number, trade name, brand name or generic name used to identify a chemical other than by its chemical name.

"(d) 'Container' means any bag, barrel, bottle, box, can, cylinder, drum, storage tank, reaction vessel, or the like that contains a hazardous chemical. For purposes of this sections, pipes, piping systems or transfer containers used in production are not considered to be containers.

"(e) 'Designated representative' means any individual or organization to whom an employee gives written authorization to exercise such employee's rights under this Chapter. A recognized or certified collective bargaining agent shall be treated automatically as a designated representative without regard to written employee authorization.

"(f) 'Discharge' means the emission of a hazardous chemical into the air or water, including the sewer system, or onto the land.

"(g) 'Emergency' means any occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which may or does result in an uncontrolled release of a hazardous chemical into the workplace.

"(h) 'Employee' means a current employee, a temporary employee, casual employee, or an employee being assigned or transferred to work where there will be exposure to hazardous chemicals. In the case of a deceased or legally incapacitated employee, the employee's legal representative may directly exercise all the employee's rights under this Chapter. Employee includes any worker who may be exposed, on or after the effective date of this Chapter, under normal conditions of use or foreseeable emergencies to hazardous chemicals, including, but not limited to, production workers, line supervisors, and repair or maintenance personnel. Office workers, grounds maintenance personnel, security personnel and non-resident management are excluded unless their job involves exposure to hazardous chemicals.

"(i) 'Employer' means the City of Akron and any person, firm, corporation, partnership, association or other entity in the City of Akron which is in any of the following Standard Industrial Codes (SIC): 7, 13 through 17, 20 through 39, 41, 42, 45, 48 through 50, 53, 54, 55, 70, 72, 516, 517, 7333, 7342, 7349, 75, 80, 863. In construction situations, 'employer' means that person or entity directly in control of the toxic or hazardous substance in the workplace.

"(j) 'Exposure' or 'exposed' means that any employee is subjected to a hazardous chemical in the course of employment through any route of entry (inhalation, ingestion, or skin contact) and includes potential (e.g. accidental or emergency) exposure, without regard to the use of personal protective equipment, but does not include situations where the employer can demonstrate that the hazardous chemical is not used, handled, stored, generated, or present in the workplace in any manner different from typical, non-occupational situations.

"(k) 'Hazardous chemical' means any substance set forth on the list promulgated pursuant to Section 1830.05.

Any mixture which is comprised of at least 1% (by weight or volume (of any chemical set forth on the list promulgated pursuant to Section 1830.05, or 0.1% of a chemical on said list which has been determined to be a carcinogen, reproductive toxin, mutagen or sensitizer shall also be considered hazardous for purposes of this Chapter, unless the mixture has been evaluated as a whole and the data indicates it is not hazardous.

"(l) 'Use' means handle, react, process, package, repackage, or transport.

"(m) 'Waste' includes all hazardous material required to be reported under Section 1830.07(b) of this Chapter.

"(n) 'Work area' means a room or defined space in an establishment where hazardous chemicals are produced, used, or where exposure could occur and where employees are present.

"(o) 'Workplace' means an establishment at one geographical location containing one or more work areas.

"1830.04 POWERS AND DUTIES OF THE COMMISSION.

"The Commission shall administer Chapter 1830, and shall be responsible for its enforcement.

"1830.05 MASTER LIST OF TOXIC AND HAZARDOUS SUBSTANCES.

"(a) No later than 90 days after the enactment of this Chapter, the Commission shall compile a Master List of Hazardous Chemicals including all the chemicals on the following list.

"(1) The Occupational Safety and Health Administrator's list of Toxic and Hazardous Substances, 29 C.F.R. §1910, Subpart Z.

"(2) The U.S. Department of Transportation's Hazardous Materials Table, 49 C.F.R. §172.101.

"(3) The American Conference of Governmental and Industrial Hygenists' list entitled 'Threshold Limit Value for Chemical Substances and Physical Agents in the Workplace.'

"(4) The International Agency for Research on Cancer's sublist entitled 'Substances found to have at least sufficient evidence of carcinogenicity in animals.'

"(5) The National Toxicology Program's list of chemicals published in the annual report on carcinogens.

"(b) The Commission shall recommend to Council any revisions to such list as it deems necessary.

"(c) Copies of the Master List shall be available to the public without cost.

"1830.06 HAZARD DETERMINATION AND COMMUNICATION PROGRAM.

"(a) Every employer manufacturing, using, or storing hazardous chemicals in the workplace shall post a sign in the form attached as Exhibit A at the location or locations where notices to employees are normally posted to inform employees that they or their designated representative have a right to information from their employer regarding the toxic or hazardous effects of the chemicals and the circumstances under which these effects may be produced.

"(b) Each employer shall develop and implement a hazard communication program for his or her workplace which meets criteria specified in Section 1830.07 through 1830.11 for labels and placards, material safety data sheets, employee information and training, and hazardous chemical lists. The employer may rely on an existing hazard communication program to comply with this section provided it meets the criteria specified in Sections 1830.07 through 1830.11.

"1830.07 LABELS AND PLACARDS.

"(a) The employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked:

"(1) With the chemical name where said name is not a trade secret under Section 1830.14.

"(2) With Department of Transporation (DOT) required labels for all substances regulated by DOT.

"(3) With a cancer warning for all materials on lists set forth in subsections 1830.05(a)(4) and 1830.05(a)(5).

"(4) With a reproductive warning for all materials on the lists set forth in subsection 1830.05 which pose a reproductive hazard.

"(b) When stationary containers in the work area have similar contents and hazards, the employer may post signs or placards to convey the required information rather than affixing labels to each individual container.

"(c) Where containers or process equipment contain hazardous chemicals and contents change frequently, or where labels would be obscured or destroyed by heat, spillage or other factors, the employer may post signs or placards to convey the required information.

"(d) This Chapter does not require labeling for materials required to be labeled under the following Acts or Regulations issued under them: Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*), Food, Drug and Cosmetic Act (21 U.S.C. 301 *et seq.*), Federal Alcohol Administration Act (27 U.S.C. 201 *et seq.*), Consumer Product Safety Act (15 U.S.C. 2051), Federal Hazardous Substance Act (15 U.S.C. 1261), and the Atomic Energy Act (42 U.S.C. 2011 *et seq.*).

"1830.08 VARIANCES.

"(a) The Director of Public Health shall have the power, upon written application by an employer, to authorize variances from the labeling provisions of Section 1830.07 which will not be contrary to the public interest or the intent of this chapter, but only where, (i) owing to special conditions pertaining to a specific employer, workplace or work area, the strict application of this chapter would cause undue or unnecessary hardship, or (ii) owing to a pre-exisitng program of an employer designed to inform or protect workers, an employer is in substantial compliance with this Chapter.

"(1) A variance for Undue or unecessary hardship shall be authorized by the Director of Public Health when the following facts and conditions exist:

"(a) Exceptional or extraordinary circumstances or conditions apply to the subject employer, workplace, or work area. In making a finding on this point, the Director of Public Health shall consider factors, including, but not limited to, extreme temperature, difficulty of access, lack of a permanent work area or workplace and volatile or rapidly changing conditions in the work area or workplace; and

"(b) The employer establishes, with approval of the Director of Public Health alternative methods of providing information about the toxic or hazardous substances involved, such as placards, posting of signs in common areas or entry areas, and oral and written communication, which shall be substituted for those requirements that are waived and which will result in substantial compliance with the intent of this chapter.

"(2) In considering a variance for a pre-existing program the Director of Public Health shall determine if the following facts and conditions exist:

"(a) The program was in existence at the time of passage of this Chapter;

"(b) The labeling used in the program conveys information in a manner substantially equal to or superior to the labeling requirements of the chapter; and

"(c) Material labeling data sheets which contain the same data as required by this chapter must be readily accessible to workers.

"(3) In modifying the literal interpretation and strict application of the provisions of this chapter and in authorizing a variance therefrom, the Director of Public Health shall impose such requirements and conditions as it may deem essential in order to carry out the intent and purpose of this chapter, and to otherwise safeguard the public health, safety and general welfare.

"(4) Variances granted pursuant to this section for undue or unnecessary hardship shall expire one year from the date of issuance, but may be renewed by the Director of Health Department upon compliance with all terms of this section. Variances granted pursuant to this section for preexisting programs shall be reexamined every five (5) years.

"(5) When an employer files an application for a variance the employer shall notify its employees and designated representative(s) of such application by immediately posting a notice of such application. Such posting shall occur in the same manner as provided for in Section 1830.06.

"1830.09 EMPLOYER FILING AND REPORTING REQUIREMENTS.

"(a) Every employer shall:

"(1) File in January of each year with the office or officer of the Health Department which the Commission has designated to receive such filings and update annually a list of all work areas in the workplace where hazardous chemicals are manufactured, used or stored specifying, subject to the provisions of Section 1830.14, by chemical name all hazardous chemicals in each work area, and

"(2) Immediately report to the office or officer of the Health Department which the Commission has designated to receive such reports any information concerning any spill, leak, discharge or emission of any hazardous substance which is required to be reported to or filed with any federal or state agency under applicable law, including but not limited to the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act and the Comprehensive Environmental Response Compensation and Liability Act; and

"(3) File with the office or officer of the Health Department which the Commission has designated to receive such filings a copy of any construction or operating permit insofar as such permit sets forth conditions for or limitations on the discharge or emission of any hazardous chemical

"(4) Pay the appropriate annual filing fee to defray part of the cost of the regulatory program including inspections.

"(b) This section shall not apply to employers engaged in the business of construction or reconstruction provided such employers are in compliance with Section 1830.10 and the quantity of any hazardous chemical manufac-

tured, used, or stored is less than 55 gallons of liquid or the equivalent thereof in its solid or gaseous state, based upon generally accepted chemical measures, per workplace.

"1830.10 MATERIAL SAFETY DATA SHEETS (MSDS)

"(a) Each employer shall obtain or develop a material safety data sheet for each hazardous chemical which it manufactures, uses, or stores. Each material safety data sheet shall contain at least the following information:

"(1) The identity used on the label, and, except as provided in Section 1830.14 governing trade secrets:

"(a) If the hazardous chemical is a single substance, or a mixture which has been tested as a whole to determine its hazards, its chemical and common names; or

"(b) If the hazardous chemical is a mixture, the chemical and common names of all ingredients set forth on the list promulgated pursuant to Section 1830.05 and which compromise greater than one percent (1%) of the composition, or one-tenth percent (0.1%) of the composition for chemicals determined to be carcinogens; and

"(c) The chemical and common names of all ingredients set forth on the list promulgated pursuant to Section 1830.05 which have been determined to be physical hazards;

"(2) The physical and chemical characteristics of the hazardous chemical (such as flash point, vapor pressure) and including the potential for fire, explosion and reactivity;

"(3) The known acute and chronic health effects of exposure to the hazardous chemical, including signs

and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical;

"(4) The primary route(s) of entry and permissible exposure limit (P.E.L.) (for those hazardous chemicals for which O.S.H.A. has promulgated as P.E.L.);

"(5) Any precautions for safe handling and use which are known to the employer or preparer, including appropriate hygienic practices, protective measures during repair and maintenance of contaminated equipment, and procedures for clean-up of spills and leaks;

"(6) Any control measures which are known to the employer or preparer such as appropriate engineering controls, work practices, or personal protective equipment;

"(7) Emergency and first aid procedure;

"(8) The date of preparation of the material safety data sheet or the last change to it;

"(9) The name, address and telephone number of the employer or preparer of the sheet;

"(10) If no information is provided for any given category on the material safety data sheet submitted by the employer, it shall be marked to indicate no information was supplied.

"(11) The employer shall update the material safety data sheet within 90 days of the time employer is notified by the preparer of the MSDA or within 90 days of the time if the employer becomes aware of any new and significant information regarding the health hazard of a chemical.

"(b) The employer shall maintain copies of the most recent material safety data sheets and shall provide one

copy to any employee, designated representative, or the Commission by the close of business on the next weekday following a request made to the appropriate company representative.

"(c) Subsection (b) hereof shall not apply to employers engaged in the business of construction or reconstruction provided such employers ensure that copies of the material safety data sheets for each hazardous substance are available during all hours of operation.

"(d) If a material safety data sheet is not available from a supplier, seller, or manufacturer of a hazardous chemical, then upon an employee's request to inspect the material safety data sheet, an employer who is merely a processor, user, or storer of the hazardous chemical shall be deemed to satisfy his obligations under this section if:

"(1) Within ten (10) working days of the employee's request the employer makes a written inquiry to the supplier, seller, or manufacturer requesting a material safety data sheet or equivalent information. If the employer has made such a written inquiry in the preceding six months, then an additional inquiry need not be made; and

"(2) The employer notifies the employee, in writing, of the date that the inquiry was made, to whom it was made, and the response, if any, received; and

"(3) The employer notifies the employee of the availability of the material safety data sheet within ten (10) working days of receipt of the material safety data sheet from the supplier, seller or manufacturer, or provides a copy of the Material Safety Data Sheets to the employee within ten working days of the receipt of the Material Safety Data Sheets.

"1830.11 EMPLOYER TRAINING PROGRAM

"(a) Every employer shall have an employee training and education program designed to provide to the employees who may be exposed to such substances or mixtures the information necessary to understand the hazards of the substances or mixtures to which they may be exposed; the hazard communication methods (labels, Material Safety Data Sheets, placards, etc.) used by the employer; appropriate work practice; protective measures; emergency procedures; and the means by which employees can receive information under this Chapter. The specific hazards and circumstances of each work area should be taken into account in determining both the complexity of the content and the frequency of repetition of the required training and education program.

"In construction situations, such information must be given to the employee within six (6) working days, of the date the employee reports to a job site and may be in the form of a written notice.

"(b) Every employer shall provide employees with or post a copy of Sections 1830.15 dealing with Employee Rights.

"1830.12 ENFORCEMENT AUTHORITY OF THE COMMISSION AND HEALTH DEPARTMENT.

"(a) The Health Department shall conduct inspections of the workplaces where hazardous chemicals are used, manufactured, or stored. The Health Department shall not attempt a forcible entry should the employer refuse to consent to such an inspection, but shall seek a proper search warrant. These inspections which are to be performed at random, shall be for the purpose of determining that hazardous chemicals are properly labeled consistent with Section 1830.06 and shall check a random

sample of material safety data sheets for compliance with Section 1830.08.

"(b) The Health Department shall investigate, within three (3) working days, any complaint in which it is alleged that employees have been ordered to work with substances which are not labeled as required by this Chapter or for which material safety data sheets required by this Chapter are not provided to employees. Each such complaint shall be in writing, signed by the complainant and using a form to be supplied by the Health Department.

"(c) The Commission shall designate employees of the Health Department to enforce this chapter. Such employees shall have authority to:

"(1) Enter upon premises where workplaces contain hazardous chemicals and seek assistance from the Department of Law when necessary to obtain search warrants if entry is refused

"(2) Issue orders to comply as authorized by the Commission.

"(3) Issue citations for failure to obey order to comply, for violations of regulations adopted by the Commission, or for violations of the provisions of this chapter.

"(d) The Commission shall report to the Council in January of each year:

"(1) The number of inspections performed during the previous year.

"(2) The number and type of enforcement actions undertaken the previous year and, if known, the final disposition thereof.

"(e) The Commission shall report to the Council by October 1 of each year proposed annual filing fee sched-

ules for the coming year calculated to yield revenues equal to the amount by which budget appropriations for the administration and enforcement of this program fall short of anticipated expenses which fee schedules shall, unless disapproved by Council, be published and become effective as are ordinances.

"(f) The Commission shall adopt procedures pursuant to which the Health Department shall maintain for public inspection the work area list from each covered employer for thirty (30) years, and provide copies to the public at cost.

"(g) The Commission shall assist other City departments and their divisions in identifying and obtaining such information as the departments and divisions need to fulfill their functions and shall promptly forward to the Fire Division copies of all employer filings required by Chapter 1830 which the Fire Division deems necessary, desirable, or useful to the performance of their duties and/or the protection of Fire Division personnel.

"1830.13 REMEDIES AVAILABLE TO LAW DIRECTOR.

"The Law Director, or his or her designee, may institute appropriate legal action, either civil or criminal, as authorized herein, or as may be otherwise available and appropriate either at law or in equity, which may in the judgment of the Law Director or his or her designee, be necessary for the enforcement of any order or orders issued pursuant to this Chapter, or the abatement of any nuisance or hazard against which such order was directed. Any such suits or proceedings shall be brought in the name of the City of Akron and no such suits or proceedings shall be held to exclude any criminal or penal remedies which may be authorized by this ordinance or any of the laws or ordinances in force or effect in the City of Akron or to exempt any violators

of this or any other laws or ordinances from any penalty or penalties as may be prescribed. This section shall not be construed to eliminate, abridge or detract from any remedies either at law or in equity which any employee or other individual may have arising out of any breach of violations of the provisions of this ordinance.

"1830.14 TRADE SECRETS

"(a) Any employer may withhold the specific chemical name if:

"(1) The material safety data sheet indicates that the spsecific chemical identity is being withheld as a trade secret;

"(2) Information contained in the material safety data sheet concerning the properties and effects of the hazardous chemicals is disclosed;

"(3) The claim that the information withheld is a trade secret can be supported;

"(4) The specific chemical identity is made available in accordance with the applicable provisions of subsections (f) and (i) of this section; and

"(5) Is not a designated carcinogen on the list identified in Sections 1830.05(4) and 1830.05(5).

"(b) Where the employer refuses, upon written request, to disclose the specific chemical identify pursuant to subsection (a) of this section and excluding those requests made pursuant to subsections (f) and (i) of this section, the denial must:

"(1) be provided to the requesting party within 30 days;

"(2) be in writing;

"(3) state the specific reasons why the request is being denied; and

"(4) explain in detail how alternative information may satisfy the specified medical occupational health need without revealing the specific identity.

"(c) Where a request for the specific chemical identity for any hazardous chemical has been denied pursuant to subsection (b) of this section, the employer must provide to the Director of Health within thirty (30) days of the request:

"(1) a copy of the written request;

"(2) a copy of the written denial pursuant to subsection (b) of this section;

"(3) evidence to support the claim that the specific chemical identity is a trade secret

"(d) Within 60 days of receipt of the denial pursuant to subsection (c) of this section, the Director of Health, or his or her designee with the advice of the Director of Law, or his or her designee shall consider the evidence to determine if the employer has supported the claim that the specific chemical identity is a trade secret pursuant to subsection (a) of this section.

"(e) If the Director of Health or his or her designee, determines that the specific chemical identity requested under subsection (a) of this section is not to be regarded as a bona fide trade secret, the employer will be subject to citation under Section 1830.20 of this Chapter if the employer does not comply within ten (10) days of receipt of the decision of the Director of Health.

"(f) No employer shall refuse to disclose to Fire Division personnel or medical personnel, where the employer knows that an emergency or accident has occurred that requires response or treatment by Fire or Health Division personnel or medical personnel, the specific chemical identity of any hazardous chemicals to which said personnel are likely to be exposed or the identity

of which said personnel deem necessary in order to render treatment to the person exposed, without regard to trade secrecy claims and regardless of the existence of a written statement of need or confidentiality agreement. The employer may require a written request and confidentiality agreement in accordance with the provisions of subsection (n) of this section as soon as circumstances permit.

"(g) No person shall knowingly claim an accident or emergency exists where such is not the case for purposes of subsection (f) of this section.

"(h) Where a request for the specific chemical identity of any hazardous chemical made pursuant to subsection is denied, the employer shall be subject to immediate citation pursuant to Section 1830.20 of this Chapter.

"(i) No employer shall, upon written request, refuse to disclose the specific chemical identity otherwise permitted to be withheld under subsection (a) of this section to any employee whom the employer knows to be an employee regularly exposed to such substance. The employer may require a confidentiality in accordance with subsection (n) of this section.

"(j) Where the employer refuses to disclose the specific chemical identify of any hazardous chemical to a requesting employee pursuant to subsection (i) of this section, the denial must:

"(1) be provided to the requesting employee within 30 days;

"(2) be in writing;

"(3) state the specific reasons why the request is being denied.

"(k) Where a request for the specific chemical identity of any hazardous chemical has been denied pursuant

to subsection (j) of this section, the employer must provide to the Director of Health, within 30 days of receipt of the request:

"(1) a copy of the written request pursuant to subsection (i) of this section.

"(2) a copy of the written denial pursuant to subsection (j) of this section.

"(3) a copy of the confidentiality agreement, if any, executed by the requesting employee pursuant to subsections (i) and (n) of this section. The employer may delete the specific chemical name from said copy.

"(l) Within 60 days of receipt of the notice of denial pursuant to subsection (k) of this section, the Director of Health, or his or her designee with the advice of the Director of Law, or his or her designee shall consider the evidence to determine if:

"(1) the requesting employee has made a written request to the employer for the specific chemical identity;

"(2) the requesting employee is an employee regularly exposed to such substance;

"(3) the requesting employee has executed a confidentiality agreement pursuant to subsections (i) and (n) of this section.

"(m) If, after consideration of the evidence pursuant to subsection (m) of this section, the Director of Health or his his or her designee determines that the specific chemical identity shall be disclosed, the employer will be subject to citation under Section 1830.20 of this chapter if the employer does not comply within ten (10) days of receipt of the decision of the Director of Health.

"(n) The confidentiality agreement provided for in subsections (f) and (i) of this section and which may

be required by the employer from other requesting parties:

"(1) May restrict use of the information to health and treatment purposes consistent with the preservation of the trade secret information;

"(2) May provide appropriate legal remedies in the event of a breach of the agreement but not stipulation of a reasonable pre-estimate of likely damages; and

"(3) May not include requirements for the posting of a penalty bond.

"(o) Nothing in this section shall be construed as requiring the disclosure under any circumstances the process or percentage of mixture information which is trade secret.

"(p) Nothing in this section is meant to preclude the parties from pursuing noncontractual remedies to the extent permitted by law.

"(q) No officer, employee, agent or contractor of any City department, board or commission shall knowingly and intentionally disclose to anyone in any manner, unless authorized by the employer claiming the data to be trade secret information, or by a court of law, any trade secret information, except as is required to administer or enforce the provisions of this chapter and perform official duties. Any person who violates this provision shall be suspended and/or removed from office or employment in the manner provided under the provisions of the Charter of the City of Akron, in addition to any other applicable proceedings and penalties for violation of trade secret provisions provided for under existing law.

"1830.15 EMPLOYEE RIGHTS.

"(a) Subject to trade secret provisions, employees and their designated representatives may request, and the employer or employers shall provide, information relating to hazardous chemicals which the employer is required to maintain and release pursuant to this Chapter.

"(b) No employer shall discharge, or cause to be discharged or otherwise disciplined, or in any manner discriminate against any employee for the reason or reasons that such person has exercised any right, made any claim or filed any complaint or suit pursuant to this Chapter.

"(c) Any employee or designated representative who believes that a violation of this Chapter exists may request an inspection by giving written notice to the office or officer designated by the Commission to receive such requests of such violation. Upon the request of the person giving such notice, his or her identity and that of employees referred to in the notice shall, to the extent permitted by state law, be confidential information and shall not be revealed or published.

"(d) Any employee who has been discharged, disciplined, or otherwise discriminated against by any employer in violation of this Chapter may, within one (1) year the violation occurs or one (1) year after the employee first obtains knowledge that a violation has occurred, commence an action in any appropriate court of law.

"(e) A designated representative, if any, shall have the right to accompany the Health Department to participate in any inspection which results from an employee complaint.

"1830.16 SUNSET PROVISION.

"If the General Assembly of the State of Ohio enacts legislation providing for employer notification of the manufacture, use, or storage of hazardous or toxic substances in the work place, this chapter shall continue in effect only if the Council of the City of Akron shall expressly

determine within ninety (90) days of the enactment of the state law whether this chapter continues essential to the health and welfare of the City of Akron and reenacts this chapter in whole or pertinent part.

"1830.17 COMPLIANCE DATES.

"Employers employing 51 or more employees shall be in compliance within one year of passage of this Chapter; employers with 50 or fewer employees shall be in compliance within 18 months of passage of this Chapter; provided, however, that all employers employing fifty-one (51) or more employees shall begin paying the annual filing fee in January of 1986, and all other employers shall begin paying the annual filing fee in January of 1987.

"1830.18 CONFLICT AND INVALIDITY.

"In any case where a provision of this chapter is found to be in conflict with a provision of any zoning, building, fire safety or health Chapter or code of the City existing on the effective date of this Chapter, the provision which establishes the higher standard for the promotion and protection of the health and safety of the people shall prevail. In any case, where a provision of this Chapter is found to be in conflict with a provision of any other Chapter or code of the City existing on the effective date of this Chapter, which establishes a lower standard for the promotion and protection of the health and safety of the people, the provisions of this Chapter shall prevail.

"1830.19 SEPARABILITY.

"Each provision of this Chapter shall be deemed independent of all other provisions herein, and should any provision of this chapter be declared invalid, all other provisions hereof shall remain valid and enforceable.

"1830.20 PENALTIES

"Whoever violates or knowingly fails to comply with any portion of this Chapter shall be fined no more than $250.00."

Section 2. Anything to the contrary hereinbefore established notwithstanding, the annual filing fees to be charged employers during the calendar year 1986 shall be as follows:

"50 or fewer employees:	$25.00 per year
"51 or more employees:	$2.00 per employee in excess of 50 employees per year, up to a maximum of $500.00

Section 3. That this ordinance is hereby declared an emergency measure for the reason that this ordinance should take effect as soon as possible, and provided this ordinance receives the affirmative vote of two-thirds of the members elected or appointed to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force at the earliest time allowed by law.

PERTINENT PROVISIONS OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

AN ACT

To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Occupational Safety and Health Act of 1970".

CONGRESSIONAL FINDINGS AND PURPOSE

SEC. (2) [29 U.S.C. § 651] The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under the Act;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giv-

ing advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of the Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

DEFINITIONS

SEC. 3. [29 U.S.C. § 652] For the purposes of this Act—

(1) The term "Secretary" mean the Secretary of Labor.

* * * *

(7) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

(8) The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

(9) The term "national consensus standard" means any occupational safety and health standard

or modification thereof which (1), has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

(10) The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act.

* * * *

SEC. 6. [29 U.S.C. § 655] (a) Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested per-

son, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this Act, the Secretary may request the recommendations of an advisory committee appointed under section 7 of this Act. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under

paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under the subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree

of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

* * * *

STATE JURISDICTION AND STATE PLANS

SEC. 18. [29 U.S.C. § 667] (a) Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6.

(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement.

(c) The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgment—

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 6 which relate to the

same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to the Act which is at least as effective as that provided in section 8, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan.

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

(d) If the Secretary rejects a plan submitted under subsection (b), he shall afford the State submitting the plan due notice and opportunity for a hearing before so doing.

(e) After the Secretary approves a State plan submitted under subsection (b), he may, but shall not be required to, exercise his authority under sections 8, 9, 10, 13, and 17 with respect to comparable standards promulgated under section 6, for the period specified in the next sentence. The Secretary may exercise the authority referred to above until he determines, on the basis of actual operations under the State plan, that the criteria set forth in subsection (c) are being applied, but he shall not make such determination for at least three years after the plan's approval under subsection (c). Upon making the determination referred to in the preceding sentence, the provisions of sections 5(a)(2), 8 (except for the purpose of carrying out subsection (f) of this section), 9, 10, 13, and 17, and standards promulgated under section 6 of this Act, shall not apply with respect to any occupational safety or health issues covered under the plan, but the Secretary may retain jurisdiction under the above provisions in any proceeding commenced under section 9 or 10 before the date of determination.

(f) The Secretary shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of his withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

(g) The State may obtain a review of a decision of the Secretary withdrawing approval of or rejecting its plan by the United States court of appeals for the circuit in which the State is located by filing in such court within thirty days following receipt of notice of such decision a petition to modify or set aside in whole or in part the action of the Secretary. A copy of such petition shall forthwith be served upon the Secretary, and thereupon the Secretary shall certify and file in the court the record upon which the decision complained of was issued as provided in section 2112 of title 28, United States Code. Unless the court finds that the Secretary's decision in rejecting a proposed State plan or withdrawing his approval of such a plan is not supported by substantial evidence the court shall affirm the Secretary's decision. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(h) The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from the date of enactment of this Act, whichever is earlier.

* * * *

GRANTS TO THE STATES

SEC. 23 [29 U.S.C. § 672] (a) The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years, to make grants to the States which have designated a State agency under section 18 to assist them—

(1) in identifying their needs and responsibilities in the area of occupational safety and health,

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(2) in developing State plans under section 18, or

(3) in developing plans for—

(A) establishing systems for the collection of information concerning the nature and frequency of occupational injuries and diseases;

(B) increasing the expertise and enforcement capabilities of their personnel engaged in occupational safety and health programs; or

(C) otherwise improving the administration and enforcement of State occupational safety and health laws, including standards thereunder, consistent with the objectives of this Act.

(b) The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years, to make grants to the States for experimental and demonstration projects consistent with the objectives set forth in subsection (a) of this section.

* * * *

(g) The Secretary is authorized to make grants to the States to assist them in administering and enforcing programs for occupational safety and health contained in State plans approved by the Secretary pursuant to section 18 of this Act. The Federal share for each State grant under this subsection may not exceed 50 per centum of the total cost to the State of such a program. The last sentence of subsection (f) of this section shall be applicable in determining the Federal share under this subsection.

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HAZARD COMMUNICATION STANDARD ISSUED BY OSHA

29 C.F.R. § 1910.1200

§ 1910.1200 Hazard communication.

(a) *Purpose.* (1) The purpose of this section is to ensure that the hazards of all chemicals produced or imported by chemical manufacturers or importers are evaluated, and that information concerning their hazards is transmitted to affected employers and employees within the manufacturing sector. This transmittal of information is to be accomplished by means of comprehensive hazard communication programs, which are to include container labeling and other forms of warning, material safety data sheets and employee training.

(2) This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject. Any state which desires to assume responsibility in this area may only do so under the provisions of section 18 of the Occupational Safety and Health Act (29 U.S.C. at 651 et seq.) which deals with state jurisdiction and state plans.

(b) *Scope and application.* (1) This section requires chemical manufacturers or importers to assess the hazards of chemicals which they produce or import, and all employers in SIC Codes 20 through 39 (Division D, Standard Industrial Classification Manual) to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program, labels and other forms of warning, material safety data sheets, and information and training. In addition, this section requires distributors to transmit the required information to employers in SIC Codes 20-39.

(2) This section applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.

(3) This section applies to laboratories only as follows:

(i) Employers shall ensure that labels on incoming containers of hazardous chemicals are not removed or defaced;

(ii) Employers shall maintain any material safety data sheets that are received with incoming shipments of hazardous chemicals, and ensure that they are readily accessible to laboratory employees; and,

(iii) Employers shall ensure that laboratory employees are apprised of the hazards of the chemicals in their workplaces in accordance with paragraph (h) of this section.

(4) This section does not require labeling of the following chemicals:

(i) Any pesticide as such term is defined in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.), when subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Environmental Protection Agency;

(ii) Any food, food additive, color additive, drug, or cosmetic, including materials intended for use as ingredients in such products (e.g., flavors and fragrances), as such terms are defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) and regulations issued under that Act, when they are subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Food and Drug Administration;

(iii) Any distilled spirits (beverage alcohols), wine, or malt beverage intended for nonindustrial use, as such terms are defined in the Federal Alcohol Administration Act (27 U.S.C. 201 et seq.) and regulations issued under that Act, when subject to the labeling requirements issued under that Act and labeling regulations issued under that Act by the Bureau of Alcohol, Tobacco, and Firearms; and,

(iv) Any consumer product or hazardous substance as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 et seq.) and Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.) respectively, when subject to a consumer product safety standard or labeling requirement of those Acts, or regulations issued under those Acts by the Consumer Product Safety Commission.

(5) This section does not apply to:

(i) Any hazardous waste as such term is defined by the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6901 et seq.), when subject to regulations issued under that Act by the Environmental Protection Agency;

(ii) Tobacco or tobacco products;

(iii) Wood or wood products;

(iv) Articles; and,

(v) Foods, drugs, or cosmetics intended for personal consumption by employees while in the workplace.

(c) *Definitions.* "Article" means a manufactured item: (i) Which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which does not release, or otherwise result in exposure to, a hazardous chemical under normal conditions of use.

"Assistant Secretary" means the Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, or designee.

"Chemical" means any element, chemical compound or mixture of elements and/or compounds.

"Chemical manufacturer" means an employer in SIC Codes 20 through 39 with a workplace where chemical(s) are produced for use or distribution.

"Chemical name" means the scientific designation of a chemical in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry (IUPAC) or the Chemical Abstracts Service (CAS) rules of nomenclature, or a name which will clearly identify the chemical for the purpose of conducting a hazard evaluation.

"Combustible liquid" means any liquid having a flashpoint at or above 100° F (37.8° C), but below 200° F (93.3° C), except any mixture having components with flashpoints of 200° F (93.3° C), or higher, the total volume of which make up 99 percent or more of the total volume of the mixture.

"Common name" means any designation or identification such as code name, code number, trade name, brand name or generic name used to identify a chemical other than by its chemical name.

"Compressed gas" means:

(i) A gas or mixture of gases having, in a container, an absolute pressure exceeding 40 psi at 70° F (21.1° C); or

(ii) A gas or mixture of gases having, in a container, an absolute pressure exceeding 104 psi at 130° F (54.4° C) regardless of the pressure at 70° F (21.1° C); or

(iii) A liquid having a vapor pressure exceeding 40 psi at 100° F (37.8° C) as determined by ASTM D-323-72.

"Container" means any bag, barrel, bottle, box, can, cylinder, drum, reaction vessel, storage tank, or the like that contains a hazardous chemical. For purposes of this section, pipes or piping systems are not considered to be containers.

"Designated representative" means any individual or organization to whom an employee gives written authorization to exercise such employee's rights under this section. A recognized or certified collective bargaining agent shall be treated automatically as a designated representative without regard to written employee authorization.

"Director" means the Director, National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services, or designee.

"Distributor" means a business, other than a chemical manufacturer or importer, which supplies hazardous chemicals to other distributors or to manufacturing purchasers.

"Employee" means a worker employed by an employer in a workplace in SIC Codes 20 through 39 who may be exposed to hazardous chemicals under normal operating conditions or foreseeable emergencies, including, but not limited to production workers, line supervisors, and repair or maintenance personnel. Office workers, grounds maintenance personnel, security personnel or non-resident management are generally not included, unless their job performance routinely involves potential exposure to hazardous chemicals.

"Employer" means a person engaged in a business within SIC Codes 20 through 39 where chemicals are either used, or are produced for use or distribution.

"Explosive" means a chemical that causes a sudden, almost instantaneous release of pressure, gas, and heat when subjected to sudden shock, pressure, or high temperature.

"Exposure" or "exposed" means that an employee is subjected to a hazardous chemical in the course of employment through any route of entry (inhalation, ingestion, skin contact or absorption, etc.), and includes potential (e.g., accidental or possible) exposure.

"Flammable" means a chemical that falls into one of the following categories:

(i) "Aerosol, flammable" means an aerosol that, when tested by the method described in 16 CFR 1500.45, yields a flame projection exceeding 18 inches at full valve opening, or a flashback (a flame extending back to the valve) at any degree of valve opening;

(ii) "Gas, flammable" means:

(A) A gas that, at ambient temperature and pressure, forms a flammable mixture with air at a concentration of thirteen (13) percent by volume or less; or

(B) A gas that, at ambient temperature and pressure, forms a range of flammable mixtures with air wider than twelve (12) percent by volume, regardless of the lower limit;

(iiii) "Liquid, flammable" means any liquid having a flashpoint below 100° F (37.8° C), except any mixture having components with flashpoints of 100° F (37.8° C) or higher, the total of which make up 99 percent or more of the total volume of the mixture.

(iv) "Solid, flammable" means a solid, other than a blasting agent or explosive as defined in § 1910.109(a), that is liable to cause fire through friction, absorption of moisture, spontaneous chemical change, or retained heat from manufacturing or processing, or which can be ignited readily and when ignited burns so vigorously and

persistently as to create a serious hazard. A chemical shall be considered to be a flammable solid if, when tested by the method described in 16 CFR 1500.44, it ignites and burns with a self-sustained flame at a rate greater than one-tenth of an inch per second along its major axis.

"Flashpoint" means the minimum temperature at which a liquid gives off a vapor in sufficient concentration to ignite when tested as follows:

(i) Tagliabue Closed Tester (See American National Standard Method of Test for Flash Point by Tag Closed Tester, Z11.24-1979 (ASTM D 56-79)) for liquids with a viscosity of less than 45 Saybolt Universal Seconds (SUS) at 100° F (37.8° C), that do not contain suspended solids and do not have a tendency to form a surface film under test; or

(ii) Pensky-Martens Closed Tester (see American National Standard Method of Test for Flash Point by Pensky-Martens Closed Tester, Z11.7-1979 (ASTM D 93-79)) for liquids with a viscosity equal to or greater than 45 SUS at 100° F (37.8° C), or that contain suspended solids, or that have a tendency to form a surface film under test; or

(iii) Setaflash Closed Tester (see American National Standard Method of Test for Flash Point by Setaflash Closed Tester (ASTM D 3278-78)).

Organic peroxides, which undergo autoaccelerating thermal decomposition, are excluded from any of the flashpoint determination methods specified above.

"Foreseeable emergency" means any potential occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which could result in an uncontrolled release of a hazardous chemical into the workplace.

"Hazard warning" means any words, pictures, symbols, or combination thereof appearing on a label or other appropriate form of warning which convey the hazards of the chemical(s) in the container(s).

"Hazardous chemical" means any chemical which is a physical hazard or a health hazard.

"Health hazard" means a chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees. The term "health hazard" includes chemicals which are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers, hepatotoxins, nephrotoxins, neurotoxins, agents which act on the hematopoietic system, and agents which damage the lungs, skin, eyes, or mucous membranes. Appendix A provides further definitions and explanations of the scope of health hazards covered by this section, and Appendix B describes the criteria to be used to determine whether or not a chemical is to be considered hazardous for purposes of this standard.

"Identity" means any chemical or common name which is indicated on the material safety data sheet (MSDS) for the chemical. The identity used shall permit cross-references to be made among the required list of hazardous chemicals, the label and the MSDS.

"Immediate use" means that the hazardous chemical will be under the control of and used only by the person who transfers it from a labeled container and only within the work shift in which it is transferred.

"Importer" means the first business with employees within the Customs Territory of the United States which receives hazardous chemicals produced in other countries for the purpose of supplying them to distributors or manufacturing purchasers within the United States.

"Label" means any written, printed, or graphic material displayed on or affixed to containers of hazardous chemicals.

"Manufacturing purchaser" means an employer with a workplace classified in SIC Codes 20 through 39 who purchases a hazardous chemical for use within that workplace.

"Material safety data sheet (MSDS)" means written or printed material concerning a hazardous chemical which is prepared in accordance with paragraph (g) of this section.

"Mixture" means any combination of two or more chemicals if the combination is not, in whole or in part, the result of a chemical reaction.

"Organic peroxide" means an organic compound that contains the bivalent -O-O-structure and which may be considered to be a structural derivative of hydrogen peroxide where one or both of the hydrogen atoms has been replaced by an organic radical.

"Oxidizer" means a chemical other than a blasting agent or explosive as defined in § 1910.109(a), that initiates or promotes combustion in other materials, thereby causing fire either of itself or through the release of oxygen or other gases.

"Physical hazard" means a chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive.

"Produce" means to manufacture, process, formulate, or repackage.

"Pyrophoric" means a chemical that will ignite spontaneously in air at a temperature of 130° F. (54.4° C) or below.

"Responsible party" means someone who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary.

"Specific chemical identity" means the chemical name, Chemical Abstracts Service (CAS) Registry Number, or any other information that reveals the precise chemical designation of the substance.

"Trade secret" means any confidential formula, pattern, process, device, information or compilation of information that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it. Appendix D sets out the criteria to be used in evaluating trade secrets.

"Unstable (reactive)" means a chemical which in the pure state, or as produced or transported, will vigorously polymerize, decompose, condense, or will become self-reactive under conditions of shocks pressure or temperature.

"Use" means to package, handle, react, or transfer.

"Water-reactive" means a chemical that reacts with water to release a gas that is either flammable or presents a health hazard.

"Work area" means a room or defined space in a workplace where hazardous chemicals are produced or used, and where employees are present.

"Workplace" means an establishment at one geographical location containing one or more work areas.

(d) *Hazard determination.* (1) Chemical manufacturers and importers shall evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous. Employers are not required to evaluate chemicals unless they choose not to rely on the evaluation performed by the chemical manufacturer or importer for the chemical to satisfy this requirement.

(2) Chemical manufacturers, importers or employers evaluating chemicals shall identify and consider the avail-

able scientific evidence concerning such hazards. For health hazards, evidence which is statistically significant and which is based on at least one positive study conducted in accordance with established scientific principles is considered to be sufficient to establish a hazardous effect if the results of the study meet the definitions of health hazards in this section. Appendix A shall be consulted for the scope of health hazards covered, and Appendix B shall be consulted for the criteria to be followed with respect to the completeness of the evaluation, and the data to be reported.

(3) The chemical manufacturer, importer or employer evaluating chemicals shall treat the following sources as establishing that the chemicals listed in them are hazardous:

(i) 29 CFR Part 1910, Subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration (OSHA); or,

(ii) *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment*, American Conference of Governmental Industrial Hygienists (ACGIH) (latest edition).

The Chemical manufacturer, importer, or employer is still responsible for evaluating the hazards associated with the chemicals in these source lists in accordance with the requirements of the standard.

(4) Chemical manufacturers, importers and employers evaluating chemicals shall treat the following sources as establishing that a chemical is a carcinogen or potential carcinogen for hazard communication purposes:

(i) National Toxicology Program (NTP), *Annual Report on Carcinogens* (latest edition);

(ii) International Agency for Research on Cancer (IARC) *Monographs* (latest editions); or

(iii) 29 CFR Part 1910, Subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration.

NOTE: The *Registry of Toxic Effects of Chemical Substances* published by the National Institute for Occupational Safety and Health indicates whether a chemical has been found by NTP or IARC to be a potential carcinogen.

(5) The chemical manufacturer, importer or employer shall determine the hazards of mixtures of chemicals as follows:

(i) If a mixture has been tested as a whole to determine its hazards, the results of such testing shall be used to determine whether the mixture is hazardous;

(ii) If a mixture has not been tested as a whole to determine whether the mixture is a health hazard, the mixture shall be assumed to present the same health hazards as do the components which comprise one percent (by weight or volume) or greater of the mixture, except that the mixture shall be assumed to present a carcinogenic hazard if it contains a component in concentrations of 0.1 percent or greater which is considered to be a carcinogen under paragraph (d)(4) of this section;

(iii) If a mixture has not been tested as a whole to determine whether the mixture is a physical hazard, the chemical manufacturer, importer, or employer may use whatever scientifically valid data is available to evaluate the physical hazard potential of the mixture; and

(iv) If the employer has evidence to indicate that a component present in the mixture in concentrations of less than one percent (or in the case of carcinogens, less than 0.1 percent) could be released in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH Threshold Limit Value, or could present a health hazard to employees in those concentrations, the mixture shall be assumed to present the same hazard.

(6) Chemical manufacturers, importers, or employers evaluating chemicals shall describe in writing the procedures they use to determine the hazards of the chemical they evaluate. The written procedures are to be made

available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director. The written description may be incorporated into the written hazard communication program required under paragraph (e) of this section.

(e) *Written hazard communication program.* (1) Employers shall develop and implement a written hazard communication program for their workplaces which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:

(i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas;

(ii) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels and the hazards associated with chemicals contained in unlabeled pipes in their work areas; and,

(iii) The methods the employer will use to inform any contractor employers with employees working in the employer's workplace of the hazardous chemicals their employees may be exposed to while performing their work, and any suggestions for appropriate protective measures.

(2) The employer may rely on an existing hazard communication program to comply with these requirements, provided that it meets the criteria established in this paragraph (e).

(3) The employer shall make the written hazard communication program available, upon request, to employees, their designated representatives, the Assistant Secretary and the director, in accordance with the requirements of 29 CFR 1910.20(e).

Hazard Communication Standard

(f) *Labels and other forms of warning.* (1) The chemical manufacturer, importer, or distributor shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following information:

(i) Identity of the hazardous chemical(s);

(ii) Appropriate hazard warnings; and

(iii) Name and address of the chemical manufacturer, importer, or other responsible party.

(2) Chemical manufacturers, importers, or distributors shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged, or marked in accordance with this section in a manner which does not conflict with the requirements of the Hazardous Materials Transportation Act (18 U.S.C. 1801 et seq.) and regulations issued under that Act by the Department of Transportation.

(3) If the hazardous chemical is regulated by OSHA in a substance-specific health standard, the chemical manufacturer, importer, distributor or employer shall ensure that the labels or other forms of warning used are in accordance with the requirements of that standard.

(4) Except as provided in paragraphs (f)(5) and (f)(6) the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged, or marked with the following information:

(i) Identity of the hazardous chemical(s) contained therein; and

(ii) Appropriate hazard warnings.

(5) The employer may use signs, placards, process sheets, batch tickets, operating procedures, or other such written materials in lieu of affixing labels to individual stationary process containers, as long as the alternative method identifies the containers to which it is applicable and conveys the information required by paragraph (f)(4) of this section to be on a label. The written mate-

rials shall be readily accessible to the employees in their work area throughout each work shift.

(6) The employer is not required to label portable containers into which hazardous chemicals are transferred from labeled containers, and which are intended only for the immediate use of the employee who performs the transfer.

(7) The employer shall not remove or deface existing labels on incoming containers of hazardous chemicals, unless the container is immediately marked with the required information.

(8) The employer shall ensure that labels or other forms of warning are legible, in English, and prominently displayed on the container, or readily available in the work area throughout each work shift. Employers having employees who speak other languages may add the information in their language to the material presented, as long as the information is presented in English as well.

(9) The chemical manufacturer, importer, distributor or employers need not affix new labels to comply with this section if existing labels already convey the required information.

(g) *Material safety data sheets.* (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet for each hazardous chemical which they use.

(2) Each material safety data sheet shall be in English and shall contain at least the following information:

(i) The identity used on the label and, except as provided for in paragraph (f) of this section on trade secrets:

(A) If the hazardous chemical is a single substance, its chemical and common name(s);

(B) If the hazardous chemical is a mixture which has been tested as a whole to determine its hazards, the chemical and common name(s) of the ingredients which contribute to these known hazards, and the common name(s) of the mixture itself; or,

(C) If the hazardous chemical is a mixture which has not been tested as a whole:

(*1*) The chemical and common name(s) of all ingredients which have been determined to be health hazards, and which comprise 1% or greater of the composition, except that chemicals identified as carcinogens under paragraph (d)(4) of this section shall be listed if the concentrations are 0.1% or greater; and,

(*2*) The chemical and common name(s) of all ingredients which have been determined to present a physical hazard when present in the mixture;

(ii) Physical and chemical characteristics of the hazardous chemical (such as vapor pressure, flash point);

(iii) The physical hazards of the hazardous chemical, including the potential for fire, explosion, and reactivity;

(iv) The health hazards of the hazardous chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical;

(v) The primary route(s) of entry;

(vi) The OSHA permissible exposure limit, ACGIH Threshold Limit Value, and any other exposure limit used or recommended by the chemical manufacturer, importer, or employer preparing the material safety data sheet, where available;

(vii) Whether the hazardous chemical is listed in the National Toxicology Program (NTP) *Annual Report on Carcinogens* (latest edition) or has been found to be a potential carcinogen in the International Agency for Research on Cancer (IARC) *Monographs* (latest editions), or by OSHA;

(viii) Any generally applicable precautions for safe handling and use which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, including appropriate hygienic practices, protective measures during repair and maintenance of contaminated equipment, and procedures for clean-up of spills and leaks;

(ix) Any generally applicable control measures which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, such as appropriate engineering controls, work practices, or personal protective equipment;

(x) Emergency and first aid procedures;

(xi) The date of preparation of the material safety data sheet or the last change to it; and,

(xii) The name, address and telephone number of the chemical manufacturer, importer, employer or other responsible party preparing or distributing the material safety data sheet, who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary.

(3) If no relevant information is found for any given category on the material safety data sheet, the chemical manufacturer, importer or employer preparing the material safety data sheet shall mark it to indicate that no applicable information was found.

(4) Where complex mixtures have similar hazards and contents (i.e. the chemical ingredients are essentially the same, but the specific composition varies from mixture to mixture), the chemical manufacturer, importer or employer may prepare one material safety data sheet to apply to all of these similar mixtures.

(5) The chemical manufacturer, importer or employer preparing the material safety data sheet shall ensure that the the information recorded accurately reflects the scien-

tific evidence used in making the hazard determination. If the chemical manufacturer, importer or employer becomes newly aware of any significant information regarding the hazards of a chemical, or ways to protect against the hazards, this new information shall be added to the material safety data sheet within three months. If the chemical is not currently being produced or imported the chemical manufacturer or importer shall add the information to the material safety data sheet before the chemical is introduced into the workplace again.

(6) Chemical manufacturers or importers shall ensure that distributors and manufacturing purchasers of hazardous chemicals are provided an appropriate material safety data sheet with their initial shipment, and with the first shipment after a material safety data sheet is updated. The chemical manufacturer or importer shall either provide material safety data sheets with the shipped containers or send them to the manufacturing purchaser prior to or at the time of the shipment. If the material safety data sheet is not provided with the shipment, the manufacturing purchaser shall obtain one from the chemical manufacturer, importer, or distributor as soon as possible.

(7) Distributors shall ensure that material safety data sheets, and updated information, are provided to other distributors and manufacturing purchasers of hazardous chemicals.

(8) The employer shall maintain copies of the required material safety data sheets for each hazardous chemical in the workplace, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s).

(9) Material safety data sheets may be kept in any form, including operating procedures, and may be designed to cover groups of hazardous chemicals in a work

area where it may be more appropriate to address the hazards of a process rather than individual hazardous chemicals. However, the employer shall ensure that in all cases the required information is provided for each hazardous chemical, and is readily accessible during each work shift to employees when they are in their work area(s).

(10) Material safety data sheets shall also be made readily available, upon request, to designated representatives and to the Assistant Secretary, in accordance with the requirements of 29 CFR 1910.20(e). The Director shall also be given access to material safety data sheets in the same manner.

(h) *Employee information and training.* Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

(1) *Information.* Employees shall be informed of:

(i) The requirements of this section;

(ii) Any operations in their work area where hazardous chemicals are present; and,

(iii) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.

(2) *Training.* Employee training shall include at least:

(i) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);

(ii) The physical and health hazards of the chemicals in the work area;

(iii) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to the used; and,

(iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

(i) *Trade secrets.* (1) The chemical manufacturer, importer or employer may withhold the specific chemical identity, including the chemical name and other specific identification of a hazardous chemical, from the material safety data sheet, provided that:

(i) The claim that the information withheld is a trade secret can be supported;

(ii) Information contained in the material safety data sheet concerning the properties and effects of the hazardous chemical is disclosed;

(iii) The material safety data sheet indicates that the specific chemical identity is being withheld as a trade secret; and,

(iv) The specific chemical identity is made available to health professionals, employees, and designated representatives, in accordance with the applicable provisions of this paragraph.

(2) Where a treating physician or nurse determines that a medical emergency exists and the specific chemical identity of a hazardous chemical is necessary for emer-

gency or first-aid treatment, the chemical manufacturer, importer, or employer shall immediately disclose the specific chemical identity of a trade secret chemical to that treating physician or nurse, regardless of the existence of a written statement of need or a confidentiality agreement. The chemical manufacturer, importer, or employer may require a written statement of need and confidentiality agreement, in accordance with the provisions of paragraphs (i) (3) and (4) of this section, as soon as circumstances permit.

(3) In non-emergency situations, a chemical manufacturer, importer, or employer shall, upon request, disclose a specific chemical identity, otherwise permitted to be withheld under paragraph (i) (1) of this section, to a health professional (i.e. physician, industrial hygienist, toxicologist, or epidemiologist) providing medical or other occupational health services to exposed employee(s), and to employees or designated representatives, if:

(i) the request is in writing;

(ii) The request describes with reasonable detail one or more of the following occupational health needs for the information:

(A) To assess the hazards of the chemicals to which employees will be exposed;

(B) To conduct or assess sampling of the workplace atmosphere to determine employee exposure levels;

(C) To conduct pre-assignment or periodic medical surveillance of exposed employees;

(D) To provide medical treatment to exposed employees;

(E) To select or assess appropriate personal protective equipment for exposed employees;

(F) To design or assess engineering controls or other protective measures for exposed employees; and,

(G) To conduct studies to determine the health effects of exposure.

(iii) The request explains in detail why the disclosure of the specific chemical identity is essential and that, in lieu thereof, the disclosure of the following information to the health professional, employee, or designated representative, would not satisfy the purposes described in paragraph (i) (3) (ii) of this section:

(A) The properties and effects of the chemical;

(B) Measures for controlling workers' exposure to the chemical;

(C) Methods of monitoring and analyzing worker exposure to the chemical; and,

(D) Methods of diagnosing and treating harmful exposures to the chemical;

(iv) The request includes a description of the procedures to be used to maintain the confidentiality of the disclosed information; and,

(v) The health professional, and the employer or contractor of the services of the health professional (i.e. downstream employer, labor organization, or individual employee), employee, or designated representative, agree in a written confidentiality agreement that the health professional, employee, or designated representative, will not use the trade secret information for any purpose other than the health need(s) asserted and agree not to release the information under any circumstances other than to OSHA, as provided in paragraph (i) (6) of this section, except as authorized by the terms of the agreement or by the chemical manufacturer, importer, or employer.

(4) The confidentiality agreement authorized by paragraph (i) (3) (iv) of this section:

(i) May restrict the use of the information to the health purposes indicated in the written statement of need;

(ii) May provide for appropriate legal remedies in the event of a breach of the agreement, including stipulation of a reasonable pre-estimate of likely damages; and,

(iii) May not include requirements for the posting of a penalty bond.

(5) Nothing in this standard is meant to preclude the parties from pursuing non-contractual remedies to the extent permitted by law.

(6) If the health professional, employee, or designated representative receiving the trade secret information decides that there is a need to disclose it to OSHA, the chemical manufacturer, importer, or employer who provided the information shall be informed by the health professional, employee, or designated representative prior to, or at the same time as, such disclosure.

(7) If the chemical manufacturer, importer, or employer denies a written request for disclosure of a specific chemical identity, the denial must:

(i) Be provided to the health professional, employee, or designated representative, within thirty days of the request;

(ii) Be in writing;

(iii) Include evidence to support the claim that the specific chemical identity is a trade secret;

(iv) State the specific reasons why the request is being denied; and,

(v) Explain in detail how alternative information may satisfy the specific medical or occupational health need without revealing the specific chemical identity.

(8) The health professional, employee, or designated representative, whose request for information is denied under paragraph (i) (3) of this section may refer the request and the written denial of the request to OSHA for consideration.

(9) When a health professional, employee, or designated representative refers the denial to OSHA under paragraph (i) (8) of this section, OSHA shall consider the evidence to determine if:

(i) The chemical manufacturer, importer, or employer has supported the claim that the specific chemical identity is a trade secret;

(ii) The health professional, employee, or designated representative, has supported the claim that there is a medical or occupational health need for the information; and

(iii) The health professional, employee, or designated representative, has demonstrated adequate means to protect the confidentiality.

(10) (i) If OSHA determines that the specific chemical identity requested under paragraph (i) (3) of this section is not a *bona fide* trade secret, or that it is a trade secret, but the requesting health professional, employee, or designated representative has a legitimate medical or occupational health need for the information, has executed a written confidentiality agreement, and has shown adequate means to protect the confidentiality of the information, the chemical manufacturer, importer, or employer will be subject to citation by OSHA.

(ii) If a chemical manufacturer, importer, or employer demonstrates to OSHA that the execution of a confidentiality agreement would not provide sufficient protection against the potential harm from the unauthorized disclosure of a trade secret specific chemical identity, the

Assistant Secretary may issue such orders or impose such additional limitations or conditions upon the disclosure of the requested chemical information as may be appropriate to assure that the occupational health services are provided without an undue risk of harm to the chemical manufacturer, importer, or employer.

(11) If, following the issuance of a citation and any protective orders, the chemical manufacturer, importer, or employer continues to withhold the information, the matter is referrable to the Occupational Safety and Health Review Commission for enforcement of the citation. In accordance with Commission rules, the Administrative Law Judge may review the citation and supporting documentation *in camera* or issue appropriate protective orders.

(12) Notwithstanding the existence of a trade secret claim, a chemical manufacturer, importer, or employer shall, upon request, disclose to the Assistant Secretary any information which this section requires the chemical manufacturer, importer, or employer to make available. Where there is a trade secret claim, such claims shall be made no later than at the time the information is provided to the Assistant Secretary so that suitable determinations of trade secret status can be made and the necessary protections can be implemented.

(13) Nothing in this paragraph shall be construed as requiring the disclosure under any circumstances of process or percentage of mixture information which is trade secret.

(j) *Effective dates.* Employers shall be in compliance with this section within the following time periods:

(1) Chemical manufacturers and importers shall label containers of hazardous chemicals leaving their workplaces, and provide material safety data sheets with initial shipments by November 25, 1985.

(2) Distributors shall be in compliance with all provisions of this section applicable to them by November 25, 1985.

(3) Employers shall be in compliance with all provisions of this section by May 25, 1986, including initial training for all current employees.

[Appendices Omitted]

(3)

Supreme Court, U.S.
FILED
MAR 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF AKRON, STATE OF OHIO; HEALTH COMMISSION, CITY OF AKRON; HEALTH DEPARTMENT, CITY OF AKRON; C. WILLIAM KECK, as Director of Health of the City of Akron; HAROLD K. STUBBS, as Director of Law of the City of Akron,

Appellants,

v.

OHIO MANUFACTURERS' ASSOCIATION; AKRON SELLE COMPANY,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

APPELLEES' MOTION TO DISMISS OR AFFIRM

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March 29, 1987

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OBJECT OF MOTION AND QUESTIONS PRESENTED

By this motion, the Ohio Manufacturers' Association and Akron Selle Company, Appellees herein, seek to obtain a dismissal of this appeal or, in the alternative, to obtain affirmance of the judgment of the United States Court of Appeals for the Sixth Circuit. In connection with dismissal, the questions presented by Appellees' motion are 1) whether Appellants have standing to appeal to this Court under 28 U.S.C. §1254 (2), which permits appeals from a court of appeals' decision holding a state statute invalid as repugnant to the Constitution, where the court of appeals has not struck down any particular provisions of the subject statute; and 2) whether Appellants have standing to appeal an issue to this Court where Appellants were prevailing and non-aggrieved parties as to that issue in the court of appeals. In connection with affirmance, the question presented by Appellees' motion is whether this case presents any substantial questions not previously decided by this Court such that plenary consideration by this Court is warranted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1242

CITY OF AKRON, STATE OF OHIO; HEALTH COMMISSION, CITY OF AKRON; HEALTH DEPARTMENT, CITY OF AKRON; C. WILLIAM KECK, as Director of Health of the City of Akron; HAROLD K. STUBBS, as Director of Law of the City of Akron,

Appellants,

v.

OHIO MANUFACTURERS' ASSOCIATION; AKRON SELLE COMPANY,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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APPELLEES' MOTION TO DISMISS OR AFFIRM

Pursuant to Supreme Court Rule 16.1, the Ohio Manufacturers' Association and Akron Selle Company, Appellees, move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States Court of Appeals for the Sixth Circuit. The grounds for this motion are as follows:

1) The constitutionality of the ordinance in question has not been definitely and finally adjudicated; therefore, a review by the Supreme Court under 28 U.S.C. §1254 is premature.

2) As prevailing and non-aggrieved parties, the Appellants lack standing to invoke appeal jurisdiction pursuant to 28 U.S.C. §1254 for review of the Court of Appeals' holding that the Occupational Safety and Health Act does not preempt local regulation of workplace safety.

3) This case presents no substantial questions not previously decided by this Court and does not warrant plenary consideration by this Court.

STATE STATUTE INVOLVED

This appeal raises the question of the validity of Chapter 1830 of the Codified Ordinances of the City of Akron, Ohio, ("Akron ordinance") as it applies to employers in Standard Industrial Classification ("SIC") Codes 20 through 39. The Akron ordinance requires the identification of hazards related to the use of hazardous chemicals in the workplace and communication of these hazards to employees. Its provisions substantially parallel the provisions of the Hazard Communication Standard promulgated by the Occupational Safety and Health Administration ("OSHA") pursuant to the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. §651 *et seq.* The Akron ordinance applies to those employers regulated by the OSHA standard—those in SIC Codes 20 through 39—in addition to employers in 25 other SIC Codes.

JURISDICTIONAL STATUTE INVOLVED

Appellants assert that the Supreme Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1254 (2), which provides that this Court may review cases in the courts of appeals:

> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to

the Constitution, treaties or laws of the United States . . .

STATEMENT

This case was instituted in Federal District Court by the Ohio Manufacturers' Association[1] and Akron Selle Company[2] on December 5, 1985, to challenge the constitutionality of the Akron ordinance, a "right-to-know law."[3] In their complaint, Plaintiffs asserted that the Akron ordinance, as it applies to employers in SIC Codes 20 through 39, the manufacturing sector, violates the Supremacy Clause of the United States Constitution in that it has been preempted by the OSH Act and by OSHA's Hazard Communication Standard ("OSHA standard"). They sought a declaratory judgment that the Akron ordinance is unconstitutional as applied and a permanent injunction to enjoin the Defendants[4] from enforcing the Akron ordinance against manufacturers.

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[1]The Ohio Manufacturers' Association is an Ohio non-profit corporation. It has no parent company; one subsidiary, the OMA Service Corporation; and no affiliates. The Ohio Manufacturers' Association is supported by the dues of approximately 1600 member companies in the manufacturing business.

[2]Akron Selle Company is a contract metal stamping company incorporated in the State of Ohio with its principal place of business in Akron, Ohio. It has no parent company, no subsidiaries and no affiliates.

[3]"Right-to-know law" is popular terminology for a law which regulates hazard communication.

[4]Defendants are the same as the Appellants herein. They include the City of Akron, State of Ohio, and the following agencies and officers of the city responsible for implementation and enforcement of the Akron ordinance: Health Commission, City of Akron; Health Department, City of Akron; C. William Keck, as Director of Health of the City of Akron; and Harold K. Stubbs, as Director of Law of the City of Akron.

The District Court found that the Akron ordinance is neither expressly nor impliedly preempted by either the OSH Act or the OSHA standard and rendered judgment for the Defendants. *Ohio Manufacturers' Association v. City of Akron,* 628 F. Supp. 623 (N.D. Ohio 1986). The Ohio Manufacturers' Association and Akron Selle Company appealed to the United States Court of Appeals for the Sixth Circuit, which reversed the judgment of the District Court and remanded the case for further proceedings. *Ohio Manufacturers' Association v. City of Akron,* 801 F.2d 824 (6th Cir. 1986). While deciding that the OSH Act itself does not expressly preempt local regulation of workplace safety and health, the Court of Appeals held that the Hazard Communication Standard does preempt such local regulation in SIC Codes 20 through 39. The Court remanded the matter to the District Court to determine which portions of the Akron ordinance are preempted and whether those portions that are not preempted are severable.

Relying upon 28 U.S.C. §1254 (2), Appellants appealed to this Court. They filed their Jurisdictional Statement and docketed their case on January 28, 1987. Appellees received an extension of time until March 29, 1987, in which to file a motion to dismiss or affirm. This motion is respectfully submitted in response to Appellants' Jurisdictional Statement.

ARGUMENT

1. *The constitutionality of the Akron ordinance has not been definitely and finally adjudicated; therefore, a review by the Supreme Court under 28 U.S.C. §1254 is premature.*

The Court of Appeals held that, through its Hazard Communication Standard, OSHA has expressly preempted local regulation of workplace safety in SIC Codes

20 through 39. As this holding applies to the Akron ordinance, the Court of Appeals simply stated:

> It is clear that the ordinance is preempted to the extent that it attempts to regulate employee safety in the workplace in SIC Codes 20-39. However, the ordinance also had as its purpose protection of the public and the providing of information to city fire fighters and public health officials regarding toxic and hazardous substances. It must also be determined whether the preempted provisions may be severed from the balance of the ordinance.
>
> We decline to make these determinations for the first time on appeal. Rather, we will remand this matter to the district court to determine which portions of the ordinance are preempted and whether those portions that are not preempted are severable.

801 F.2d at 834. The Court of Appeals thus made no ruling as to the applicability of its holding to the specific provisions of the Akron ordinance. Because the Court of Appeals did not actually strike down any particular provisions of the Akron ordinance, Supreme Court review of this matter under 28 U.S.C. §1254 (2) is premature.

In *Shaker v. O'Connor*, 278 U.S. 188, 189 (1929), this Court construed §1254 (2)'s predecessor statute as allowing only appeals of "final" judgments. In *South Carolina Electric and Gas Company v. Flemming*, 351 U.S. 901 (1956) (*per curiam*), this Court also followed the finality doctrine espoused in *Shaker* in declining jurisdiction over an appeal taken under §1254 (2).

The finality doctrine has more recently been considered in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), where the Supreme Court determined that the finality test had been met in an appeal brought under §1254 (2). In

Dukes, the court of appeals had held a grandfather clause in a New Orleans ordinance to be unconstitutional and remanded the case to the district court to determine whether the invalid clause could be severed from the remainder of the ordinance. Finding that the case met the finality test of §1254 (2), the Supreme Court assumed jurisdiction to review the court of appeals' decision. This Court's discussion of the finality doctrine as applied to the facts of the *Dukes* case provides guidelines for determining the propriety of the review at bar. In connection with the ordinance considered in *Dukes,* the Court explained:

> The unconstitutionality of the ordinance, in its application to appellee, has been definitely and finally adjudicated by the Court of Appeals, and only a state-law question remains to be decided on remand—whether the statute will be totally invalidated or whether only its "grandfather provision" will be struck down. There is no federal, much less constitutional, question which is yet to be resolved below. . . . Furthermore, to the extent any "finality" requirement in the context of §1254 (2) might be premised on the policies of avoiding piecemeal appeals or the rendering of advisory opinions, neither difficulty is likely to eventuate in this case; even if we were to uphold the Court of Appeals' remand for a determination of the severability of the "grandfather provision" under state law, the ruling on remand is not one which would be subject to further review in this Court.

427 U.S. at 302.

Unlike the situation in *Dukes,* this case involves both federal and state issues on remand. The District Court has first been instructed to apply the Court of Appeals' standard to each provision of the Akron ordinance to determine which portions of the ordinance involve workplace

hazard communication and are thus preempted. Second, the District Court must decide whether the preempted provisions may be severed from the remainder of the ordinance. This second determination requires application of only state law. However, the first determination deals with a federal issue. Because there is still a federal question involved in deciding which provisions of the Akron ordinance will be preempted, a ruling on remand in this case may be subject to further review in this Court. Thus, this case does not meet the finality test and is not yet ready for review.

2. *As prevailing and non-aggrieved parties, the Appellants lack standing to invoke appeal jurisdiction pursuant to §1254 for review of the Court of Appeals' holding that the Occupational Safety and Health Act does not preempt local regulation of workplace safety.*

Appellants have advanced two questions for consideration by this Court. First, Appellants ask this Court to review the Court of Appeals' holding that the OSH Act does not preempt local regulation of workplace practices which are governed by OSHA's Hazard Communication Standard. Second, Appellants ask the Court to review the Court of Appeals' holding that the OSHA standard does preempt local regulation of workplace practices which are regulated by the standard. *See* Jurisdictional Statement at i.

Assuming, *arguendo,* that Appellants have standing to invoke this Court's jurisdiction under 28 U.S.C. §1254, they have standing to seek review of only the second issue advanced by them—whether the OSHA standard has preemptive effect upon local regulation. The first issue, the OSH Act's preemptive effect upon local regulation, is an issue upon which Appellants prevailed in both the District

Court and the Court of Appeals. As parties not aggrieved with respect to this issue, Appellants simply do not have standing to invoke Supreme Court jurisdiction for further consideration.

Foreclosing Appellants from securing further review of the issue of OSH Act preemption is in keeping with the Supreme Court's long-standing policy of exercising judicial restraint. In *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105 (1944), this Court enunciated that policy as follows:

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.

Adjudication is not unavoidable if an appellant or petitioner under 28 U.S.C. §1254 has not been aggrieved by the lower court's decision and the appellee or respondent, the party who has been aggrieved, does not cross-appeal for review of the decision. Thus, this Court has held that "[o]n certiorari only so much of the judgment below as was adverse to the petitioner is reviewable." *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting,* 287 U.S. 329, ¶1 *syllabus* (1932). In the case at bar, the Court of Appeals' holding that OSHA's standard has preemptive effect over local regulation was "only so much of the judgment below as was adverse" to the Appellants. Therefore, only the issue of the *standard's* preemptive effect is now reviewable.[5]

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[5]The Appellants argue that the question of OSH Act preemption of local regulation is "substantial and would necessarily have to be reexamined in connection with this appeal." Jurisdictional Statement at 13.

(Continued on next page)

3. *This case presents no substantial questions not previously decided by this Court and does not warrant plenary consideration by this Court.*

The Court of Appeals held that OSHA's standard preempts local regulation of workplace safety in SIC Codes 20 through 39. Based upon an application of the Supreme Court's prior rulings, the Court of Appeals properly decided this issue. Because the propriety of OSHA preemption of local regulation is clearly supported by existing law on agency preemption, and because Appellants have cited no case law in support of their contrary position, plenary consideration of this issue by the Supreme Court is not warranted.

In its standard, OSHA included the following language regarding the standard's purpose and its preemptive effect:

> (2) This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject. Any state which desires to assume responsibility in this area may only do so under the provisions of section 18 of the Occupational Safety and Health Act (29 U.S.C.

(Continued)

However, Appellants give no reason for the purported necessity of reexamining this question in the context of this appeal. That the question may be substantial is simply not reason to warrant review by the Supreme Court. This Court has refused to review issues it has characterized as important where the aggrieved party has not cross-petitioned for their review. *See Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1973), relying upon *NLRB v. International Van Lines*, 409 U.S. 48, 52 n.4 (1972). Regardless of the importance of the OSH Act preemption issue, because Appellees, the aggrieved parties herein, have not cross-appealed for its review, it is not before this Court.

651 et seq.) which deals with state jurisdiction and state plans.

29 C.F.R. §1910.1200 (a) (2). It is clear from the above provision that OSHA intended its standard to preempt "state law." It is clear from the preambles to OSHA's final standard and its proposed standard that OSHA's reference to "state law" was intended to mean *all* state law regarding workplace hazard communication, at whatever level, except state law enacted as a state plan approved by OSHA under Section 18 of the OSH Act, 29 U.S.C. §667. For example, in the preamble OSHA published on March 19, 1982, with its notice of proposed rulemaking, the agency explained its intent to promulgate a single, comprehensive federal standard which would eliminate problems apt to result from numerous state *and local* right-to-know laws:

> 5. *Conflicting State and Local Standards.* At the present time, nine states and the city of Philadelphia have enacted unique worker right-to-know laws. Other state and municipal governments, including New Jersey; Ohio, and such cities as Louisville, Kentucky and Santa Monica, California, are in various stages of considering the enactment of similar laws.
>
> The potential for conflicting or cumulatively burdensome state and local laws has been acknowledged by a number of industry representatives, particularly those involved in chemical manufacturing. Since most manufacturers transport their products across state lines, the proliferation of state and local standards may create a burden on interstate commerce. Furthermore, the differences among these standards result in varying levels of protection for employees exposed to the same hazards.
>
> A single, comprehensive Federal Standard for hazard communication would eliminate this conflict,

> decrease the cumulative burden of compliance, and ensure basic protection for all employees.

47 Fed. Reg. 12095 (1982).

Similar comments made in other parts of this preamble and in the preamble to OSHA's final standard further demonstrate the agency's intent to preempt both state and local regulation. For example, in its detailed analysis of the final standard, OSHA explained the standard's preemption provision as follows:

> This preemption will serve to reduce the burden on interstate commerce produced by conflicting state *and local* regulations and will ensure that all employees in the manufacturing sector are accorded the same degree of protection.

48 Fed. Reg. 53334 (1983) (emphasis added).

The Court of Appeals gave effect to the preemptive intent evidenced by the above statements and other comments made in the agency's preambles. First, under *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), the Court of Appeals noted that state and local laws can be preempted by federal regulations as well as by federal statutes. 801 F.2d at 831. This doctrine has repeatedly been espoused by the Supreme Court. *See, e.g., Fidelity Federal Savings & Loan Assn. v. De La Cuesta,* 458 U.S. 141, 153 (1982); *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 699 (1984); *Louisiana Public Service Commission v. Federal Communications Commission,* 54 U.S.L.W. 4505, 4509 (May 27, 1986). Second, under *Fidelity Federal,* 458 U.S. at 158, the Court of Appeals recognized that "the preamble to a regulation is valid evidence of the administrative construction of the regulation." 801 F.2d at 832-833. That an agency

may make its preemptive intent clear through its preambles is also supported by this Court's comments in *Hillsborough,* 471 U.S. at 718.

In addition to recognizing that OSHA intended its standard to preempt local regulation, the Court of Appeals also found that this preemption was within the agency's authority. 801 F.2d at 833-834. Appellants, however, assert that OSHA exceeded its authority under the OSH Act when it preempted local right-to-know ordinances. In support of this assertion, Appellants advance a number of unconvincing reasons.

First, Appellants believe that OSHA acted outside its authority when it preempted local regulation because "the policy of the Act is to encourage, not exclude, state and local regulation." Jurisdictional Statement at 21. Appellants, however, misrepresent the policy of the OSH Act. The primary purpose and policy of the OSH Act were declared by Congress in Section 2 of the Act:

> (b) The Congress declares it to be its purpose and policy . . . to assure as far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. . . .

29 U.S.C. §651(b). After making the above declaration, Congress advanced a litany of ways in which it intended to achieve its purpose, including the following:

> (11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with

> the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith. . . .

29 U.S.C. §651(b)(11). This goal in no way reflects Congressional policy to encourage *local* regulation of occupational safety and health concerns. It does admittedly reflect Congressional policy to encourage *state* regulation of occupational safety and health concerns, which can be accomplished through the states' adoption of state plans approved by the Secretary of Labor pursuant to Section 18 of the Act, 29 U.S.C. §667. However, OSHA's preemption of local regulation does not interfere with any Congressional policy of encouraging state regulation. OSHA's standard expressly acknowledges that a state that wants to assume responsibility for workplace hazard communication may do so in accordance with Section 18 of the OSH Act. *See* 29 C.F.R. §1910.1200(a)(2). Thus, in its preemption of local regulation, OSHA has not contravened Congressional intent that safe and healthful working conditions be achieved by, among other things, encouraging *states* to take over the responsibility for occupational safety and health regulations in accordance with Section 18.

In addition to misrepresenting the policy of the OSH Act, Appellants fail to acknowledge an agency's power to reconcile conflicting policies when administering a Congressionally created program committed to the agency's care. In *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 699 (1983), this Court repeated its longstanding policy regarding this power in connection with an agency's attempt to preempt local law:

And, as we made clear in *Fidelity Federal Savings and Loan Assn.* v. *De la Cuesta*, 458 U.S. 141 (1982):

> "Federal regulations have no less preemptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. When the administrator promulgates regulations intended to preempt state law, the court's inquiry is similarly limited: 'If [h] is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *Id.*, at 153-154, quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961).

See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-845 (1984).

Appellees acknowledge that one policy of the OSH Act was to encourage assumption of occupational safety and health regulation by the states. This was not, however, the only policy which OSHA appropriately considered in deciding to preempt local regulation of workplace hazard communication. OSHA also determined it proper to achieve some uniformity in regulation when it promulgated its standard, *partly* in anticipation of the burden on interstate commerce which would be imposed by a multitude of varying state and local regulations. This consideration is evident from statements made by OSHA in the preamble to the proposed and final standard. However,

there is nothing in the preambles to suggest that this consideration was at odds with encouraging state assumption of safety and health regulation or at odds with OSHA's, and Congress', primary objective—to assure safe and healthful working conditions.

As the Court of Appeals observed, "OSHA could legitimately determine that uniformity (resulting from preemption) would aid in the administration and enforcement of, and compliance with, its standard." 801 F.2d at 834. The preamble to the final standard bears out this conclusion. In discussing the need for a uniform federal standard, OSHA summarized comments it had received in response to the publication of its proposed standard. Among the comments considered by OSHA in drafting its final standard where those expressing the following view:

> [A] Federal OSHA Standard, rather than a variety of differing State and local requirements, best serves the interests of the private sector, labor interests, the general public and the Agency itself. . . .
>
> Without a strong Federal role, individual States will enact a variety of diverse labeling rules that would hamper interstate business operations *and impede worker protection.*

48 Fed. Reg. 53283-53284 (1983), quoting from comments submitted to the agency by the National Paint and Coatings Association (emphasis added). OSHA also remarked in its preamble that concerns similar to the above were expressed by *many* of the participants in the rulemaking. 48 Fed. Reg. 53284 (1983). It then agreed "with a majority of the participants in the rulemaking that the need for a Federal standard has been amply demonstrated." *Id.*

The Hazard Communication Standard is unique when compared to other standards promulgated by OSHA. Its primary concern is with imparting information to employees so that they know how best to handle chemicals used in the workplace and to protect themselves from their attendant hazards. In its notice of proposed rulemaking, OSHA pointed out the difference between this goal and the goal of its other health and safety standards:

> The purpose of the proposed hazard communication standard differs substantially from other OSHA regulations. Rather than directly control exposure levels in the workplace, it is designed to enhance employer and employee awareness of the safety and health hazards associated with chemical substances.

47 Fed. Reg. 12112 (1982). While more regulation might be better in connection with controlling exposure levels in the workplace, more regulation is not necessarily better in connection with communicating important information to employees. Because of the information disclosure nature of the Hazard Communication Standard, it is quite feasible that compliance with numerous and differing state and local right-to-know laws would, as the comments to OSHA's proposed standard pointed out, actually impede worker protection.[6] Due to this potential, preemption of

[6]Comparison of the Akron ordinance with OSHA's standard illustrates this. The Hazard Communication Standard requires each container of hazardous chemicals to be labeled with the chemical or common name of the chemical contained within. 29 C.F.R. §1910.1200(f)(1)(i). This may be a designation developed by the International Union of Pure and Applied Chemistry ("IUPAC") or the Chemical Abstracts Service ("CAS") rules of nomenclature *or* another designation or identification that is a "common name." *See* 29 C.F.R. §1910.1200(c). In addition to OSHA's labeling requirement, under §1830.07 of the Akron ordinance a requirement to place up to four

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local regulation is not at all at odds with the primary Congressional goal of providing protection in the workplace. Rather, preemption of literally thousands of local laws would actually aid in hazard communication by assuring that employees are presented only with clear and effective hazard information.

OSHA without doubt intended that the effectiveness of its standard in communicating hazards to employees not be undermined or weakened by a variety of laws. This is also evident from OSHA's discussion of its approval of

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(Continued)
additional labels on containers of hazardous chemicals could be imposed upon regulated employers. First, the Akron ordinance requires each container of hazardous chemicals to be labeled with the CAS or the IUPAC name of the chemical in the container, and does not alternately allow any other designation or identification. An upstream chemical manufacturer located outside of Akron but supplying his chemical to an Akron employer may, under the OSHA standard, place a label on the container with a common name which is neither a CAS nor an IUPAC name. Therefore, to be in compliance with the Akron ordinance, the Akron employer would have to add a label with the CAS or the IUPAC name to the container.

Second, if the hazardous chemical is listed as a carcinogen on the Master List prepared under §1830.05 of the Akron ordinance, its container would also need to be marked by the employer with a cancer warning pursuant to §1830.07(a)(3). This would not be required under the OSHA standard. Third, if the substance also poses a reproductive hazard, a label setting forth a reproductive warning would also be required under the Akron ordinance, §1830.07(a)(4). Finally, §1830.07(a)(2) of the Akron ordinance requires labeling with Department of Transportation ("DOT") required labels for all substances regulated by the DOT. Therefore, if the subject chemical is regulated by the DOT, the Akron ordinance would require yet another label, not required under the OSHA standard, to be placed on its container. Rather than assisting in the communication of information to employees, all of these labels may well confuse employees and impede hazard communication, contrary to the intent Congress and of the standard.

state plans submitted to the Secretary of Labor under Section 18 of the OSH Act. Again, OSHA indicated its intent that state standards with additional requirements would not be allowed to interfere with the effectiveness of the federal standard:

> Section 18(c), 29 U.S.C. 667(c), authorizes the Secretary to approve the submitted plan only if the state plan provides for standards and a plan for their enforcement which are, *inter alia*, "at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under Section 6 which relate to the same issues."
>
> While questions of effectiveness and commonality of issues must be resolved on an *ad hoc* basis, in general the Secretary intends to scrutinize carefully any state law or regulation submitted under an approved state plan which contains any hazard determination or communication requirements which are applicable to chemical manufacturers or other employers in SIC Codes 20-39. *The purpose of this review is to assure not only equal or greater effectiveness but also that any additional requirements contemplated by the state do not conflict with or adversely affect the effectiveness of OSHA's standard.*

48 Fed. Reg. 53322-53323 (1983) (emphasis added). This demonstrates that OSHA did consider the impact of outside regulation on the *effectiveness* of OSHA's standard and not just on its burden to employers. Its also demonstrates that OSHA was not averse to more stringent requirements and that it had worker protection foremost in mind. However, worker protection was, OSHA believed, best accomplished through implementation of *one* effective standard, whether that be the federal standard

or an approved state standard that supplanted the federal standard.

Contrary to Appellants' assertion, OSHA did not exceed its authority under the OSH Act when it preempted local regulation of hazard communication in the workplace. It carefully weighed and reconciled various policies under the Act. The agency's decision to completely preempt local regulation and to approve state plans only after careful scrutiny is completely compatible with its primary desire and intent to effectively communicate workplace hazards to employees—also the Congressional primary goal. OSHA's preemption choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Capital Cities Cable*, 467 U.S. at 699.

Appellants, however, apparently believe that an accommodation of policies was beyond OSHA's authority. In their Jurisdictional Statement, Appellants argue that the role of the Labor Department under the OSH Act is "quite limited" and that it "does not have plenary authority to interpret or administer the Act." Jurisdictional Statement at 21. This, Appellants assert, is the second reason the agency purportedly exceeded its authority by preempting local regulation. However, there is no support for Appellants' claim that the role of the agency under the Act is so limited.

In citing the Labor Department's authority under the OSH Act, Appellants mention only its authority to promulgate occupational safety and health standards pursuant

to Section 6, 29 U.S.C §655.[7] The Labor Department, however, has very broad regulatory authorities under the OSH Act. For example, under Section 8(g)(2) of the Act, 29 U.S.C. §657(g)(2), the Secretary of Labor is authorized to "prescribe such rules and regulations as he may deem necessary" to carry out his responsibilities under the Act. Under Section 18, 29 U.S.C. §667, the Secretary has authority to review, approve or reject state plans; to engage in a continuing evaluation of the implementation of state plans which have been approved; and to withdraw previously granted approvals of state plans that are not complied with. The Secretary has broad enforcement authority under Section 9, 29 U.S.C. §658, and may issue citations to employers for violations of their duties under the Act, OSHA's rules, its standards, regulations or orders. Under Section 8, 29 U.S.C. §657, the Secretary may enter, inspect and investigate places of employment; require attendance and testimony of witnesses and production of evidence under oath; and prescribe regulations requiring employers to maintain records and submit reports. The Secretary has authority under Section 20, 29 U.S.C. §669, to develop plans for and conduct research, experiments, and demonstrations regarding occupational safety and health; to disseminate related information to employers and employees;

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[7]Appellants then rely upon the definition of "occupational safety and health standard" found in Section 3(8), 29 U.S.C. §652(8), to conclude that the Act "does not give the Department authority to preempt local ordinances dealing with the same subject matter." Jurisdictional Statement at 21. Appellants are apparently suggesting that Congress must *expressly* grant an agency preemption powers before that agency may preempt state law. This is simply not correct. This Court has made it quite clear that an agency may preempt state regulation in the absence of an expression of preemptive intent by Congress provided it meets the standards set out in *Capital Cities Cable*, quoted *supra*, and its antecedents. An express Congressional grant of authority to preempt is not required.

to establish programs for medical examinations and tests; and to prescribe regulations necessary for implementation of research and related activities.

The above authorities certainly give the Secretary broad responsibility to administer and discretion to interpret the Act in a manner he believes best accomplishes the objectives of the Act—occupational safety and health. Therefore, under the authority of *Capital Cities Cable, supra*, the Court's review of OSHA's preemption must be limited to determining whether the Secretary's choice to preempt local regulation represents a "reasonable accommodation of conflicting policies." As already demonstrated, preemption of local laws regulating hazard communication in the workplace does represent such an accommodation.

Appellants also question OSHA's preemption authority because, to their knowledge, this Court has never examined an agency's preemption of an "entire field" of state regulation. Jurisdictional Statement at 19. Appellants suggest that an agency's effort to preempt an entire field of state regulation, as opposed to a specific provision of state law, "requires close judicial examination." Jurisdictional Statement at 20. In support of this assertion, Appellants provide the following explanation:

> Unlike the Congress, whose members represent their respective states, federal administrators have no allegiance to state interests and have an inevitable bias in favor of federal regulatory policies. For this reason, the deference that courts customarily grant to administrative decisions in other areas . . . is inappropriate with respect to administrative preemption of state and local law.

Jurisdictional Statement at 20-21.

After claiming a distinction between preemption of a specific provision of state law and preemption of an entire field of regulation, Appellants fail to explain why preemption of an "entire field" would require closer judicial scrutiny than preemption of a specific provision of state law. Are Appellants suggesting that an agency's purported bias in favor of federal regulatory policies appears only when it preempts an "entire field" of state regulation? Appellants' rationale in support of further scrutiny by this Court simply fails to demonstrate why this case should be measured by a standard different from the standard repeatedly used by this Court in other agency preemption cases that deal with "specific provisions", and not an "entire field", of state law. The Supreme Court's standard for reviewing administrative preemption is clear, and Appellants advance no legitimate reason for this Court's reconsideration of that standard.

Furthermore, if Congress is concerned that agencies might preempt local laws when Congress feels preemption would not be appropriate, it can easily fashion its statutes to expressly allow for local regulation. In fact, Congress has recently done just that. The recently enacted Title III of the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §11000 *et seq.*, is an Emergency Planning and Community Right-to-Know Act ("Community Right-to-Know Act"). Section 321 of the Community Right-to-Know Act, 42 U.S.C. §11041, expressly recognizes the right of local governments to enact legislation governing the subject regulated by the Community Right-to-Know Act. This section specifically provides that nothing in the federal act shall preempt state or local law in the area of

community right-to-know.[8] Congress could just as easily have included a provision in the OSH Act which would expressly provide for local regulation of occupational safety and health concerns.

Although Appellants advance a number of reasons why OSHA should not have preempted local regulation of workplace hazard communication, they cite no case law to support their reasons. This is because there is no law favorably applicable to the Appellants' position. Cases previously decided by this Court all support OSHA preemption. Because this case presents no substantial questions *not* previously decided by this Court, it does not warrant this Court's plenary consideration.

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[8]Enactment of the Community Right-to-Know Act also addresses another concern expressed by Appellants. Appellants lament that "at stake in this case is not merely the validity of one local ordinance, but the right of all local governments to enact 'right-to-know' legislation to protect the health and safety of their citizens." Jurisdictional Statement at 12. Appellant's characterization of the ante in this case is excessively broad. This case involves preemption of local laws regarding hazard communication only as they relate to workers in the manufacturing sector. It does not involve hazard communication to workers in other employment arenas. More important, it does not involve the right of local governments to enact *community* right-to-know legislation. This right is clearly established in §321 of the Community Right-to-Know Act.

CONCLUSION

For the foregoing reasons, Appellants respectfully move this Court to dismiss the appeal of this case or, in the alternative, to affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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No. 86-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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Appellants,

v.

OHIO MANUFACTURERS' ASSOCIATION; AKRON SELLE COMPANY,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees have raised three points in their motion to dismiss or affirm. We respond briefly to each of them.

I. THE FINALITY ISSUE

Appellees contend that the judgment of the court of appeals lacks sufficient "finality" to be appealable under 28 U.S.C. § 1254(2). Nothing in the language of § 1254(2)

suggests that a judgment appealed from under that statute must be "final." The notion that finality is required stems from *Slaker v. O'Connor*, 278 U.S. 188 (1929), which involved a predecessor statute but which the Court cited 17 years later in a *per curiam* order dismissing an appeal under § 1254(2). *South Carolina Gas Co. v. Flemming*, 351 U.S. 901 (1956). In more recent cases, however, the Court has repeatedly indicated that the issue of whether Section 1254(2) requires finality has not been settled. See *Chicago v. Atkinson, T. & S.F.R. Co.*, 357 U.S. 77, 82-83 (1958); *City of El Paso v. Simmons*, 379 U.S. 497, 502 (1965); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1975); *City of New Orleans v. Dukes*, 427 U.S. 297, 301-02 (1976).

If the Court finds it necessary to decide the issue in this case, we urge it to hold that there is no finality requirement in Section 1254(2). The fact that finality is expressly required by 28 U.S.C. § 1257, defining this Court's jurisdiction to review the judgments of state courts, and by 28 U.S.C. § 1291, defining the appellate jurisdiction of the courts of appeals, clearly indicates that the omission from Section 1254(2) of any language requiring finality was deliberate. It is also significant that neither Section 1254(1), dealing with review of cases in the courts of appeals by writ of certiorari, nor Section 1254(3), dealing with certified questions from the courts of appeals, contains any requirement of finality.

The Court can avoid deciding this issue, however, by holding, as it did in *City of New Orleans v. Dukes*, *supra*, that the judgment in this case is sufficiently "final" to satisfy any finality requirement that may exist. Here, as in *City of New Orleans*, the fundamental issue raised as to the validity of the challenged local ordinance has been finally decided, and all that remains to be done on remand is the implementation of that decision. It is true, as appellees argue, that the remand in *City of New Orleans* involved only the state law issue of severability, while in

this case there are also some federal issues that remain to be decided. Nevertheless, in this case, as in *New Orleans*, the issues to be decided on remand are separate and distinct from the question that provides the basis for appellate jurisdiction under Section 1254(2)—namely, whether the challenged ordinance is "invalid as repugnant to the Constitution, treaties, or laws of the United States." On that issue, the decision below is final.

In any event, even if the Court were to hold that it lacks appellate jurisdiction to review the judgment below under 28 U.S.C. § 1254(2), there is no question that the Court has certiorari jurisdiction under 28 U.S.C. § 1254 (1). In these circumstances, 28 U.S.C. § 2103 requires the Court to treat the case as if presented on a petition for a writ of certiorari. For the reasons already stated in the Jurisdictional Statement, we believe the issues presented in this case are of sufficient importance to warrant review either on appeal or by writ of certiorari.

II. THE QUESTIONS PRESENTED

Appellees contend that the fiirst issue raised in the Jurisdictional Statement, whether the OSH Act itself preempts the Akron "right-to-know" ordinance, cannot be raised by appellants because it was decided below in their favor. Appellees argue that the only issue that can properly be raised on this appeal is the issue that was decided adversely to appellants: namely, whether the Hazard Communication Standard issued by the Department of Labor preempts the Akron ordinance, and if so, whether the Department has the authority to issue such a preemptive standard.

We discussed both of these issues in the Jurisdictional Statement because we do not see how the second issue can be considered in isolation from the first. This is particularly true with respect to the portion of the second issue that concerns the Department of Labor's *statutory authority* to issue a preemptive standard. In order to determine

the Department's authority, the Court would inevitably be required to consider the extent to which the statute itself either preserves or preempts state and local law. Indeed, appellees themselves discuss this issue at length in the section of their motion that is addressed to the merits.

Moreover, if this Court were to grant plenary review in this case, appellees would undoubtedly want to argue that the result reached below was required not merely by the Hazard Communication Standard but by the statute itself. It was our assumption that the Court would permit that argument, and therefore we thought it appropriate to discuss the issue in the Jurisdictional Statement.

Appellants, however, would have no objection to confining their appeal to the second issue raised in the Jurisdictional Statement if both appellees and the Court wish to limit this case in that fashion. Certainly that issue alone is of sufficient importance both to the development of the law under the OSH Act and, more broadly, to the law of federal preemption, to warrant plenary consideration by this Court.

III. THE MERITS

Most of appellees' motion is addressed to the merits of this appeal. Our views on the merits have already been stated in the Jurisdictional Statement and need not be repeated here. We do wish, however, to make the following comments in response to appellees' arguments.

A. In their argument that the Hazard Communication Standard was intended by the Department of Labor to preempt local right-to-know ordinances, appellees ignore the fact that, at the time the Standard was issued, the Department's view was that the statute *itself* auomatically preempts local laws dealing with any matters that are the subject of a federal occupational safety and health standard. Both courts below have now held that this reading of the statute was wrong, and appellees seem to

have accepted that holding for purposes of this appeal. In these circumstances, appellees' arguments concerning the preemptive "intent" of the Hazard Communication Standard are totally unpersuasive. It is meaningless to talk of "intent" when the agency which issued the standard believed it had no discretion whatever concerning the matter of preemption.

B. Appellees argue that the OSH Act, while admittedly encouraging state regulation of occupational safety and health matters, expresses no similar policy with respect to local regulation. Appellees make no effort, however, to reconcile this argument with this Court's long-established "presumption that state *and local* regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716 (1985) (emphasis added). Appellees' argument would stand this presumption on its head, and find the requisite statutory intent to preempt local ordinances from the fact that the statute does not expressly preclude such preemption. Moreover, appellees point to nothing in the legislative history of the OSH Act to support their novel argument that the statute was intended to have a greater preemptive effect on local ordinances than on state statutes.

C. Appellees purport to see no difference between a federal agency's authority to preempt provisions of state or local laws which directly conflict with a regulation validity issued by that agency, and an agency's authority to preempt by administrative fiat an entire field of regulation even in the absence of any such direct conflict. We submit that the difference is substantial, and that there is a need for this Court to establish standards for determining when an agency has authority to preempt an entire regulatory field. Contrary to appellees' argument, none of the prior decisions of this Court which involved administrative preemption have addressed this important question.

CONCLUSION

For the reasons stated above and in the Jurisdictional Statement, this Court should note probable jurisdiction of this appeal. If, however, the Court should conclude that the judgment below is not appealable pursuant to 28 U.S.C. § 1254(2), it should treat the Jurisdictional Statement as a petition for a writ of certiorari in accordance with 28 U.S.C. § 2103 and grant the writ.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR APPELLANTS

Appellants are filing this supplemental brief to bring to the Court's attention, and to comment briefly upon, the revised Hazard Communication Standard that was issued by the Occupational Safety and Health Administration (OSHA) of the Department of Labor on August 24, 1987. 55 Fed. Reg. 31,852 (August 24, 1987).[1]

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[1] For the convenience of the Court, we are lodging with the Clerk one copy of the revised Standard, including its explanatory preamble, in typewritten form, which we have obtained from the

This revised Standard was issued in response to the decision of the United States Court of Appeals for the Third Circuit in *United Steelworkers v. Auchter*, 763 F.2d 728, 736-39 (3d Cir. 1985), which held, *inter alia*, that OSHA had failed adequately to justify its decision to limit the original Standard to employers in the manufacturing sector. The court in that case directed the Secretary of Labor "to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible." *Id.* at 739.

In the newly-issued revised Standard, OSHA has now extended the Standard's coverage to non-manufacturing employers, and has "tailored" its provisions in certain respects to make it suitable for such employers. For purposes of the present case, however, the most significant aspect of the revised Standard is that it directly addresses, for the first time, the issue of preemption of local laws. Section 1910.1200(a)(2) of the revised Standard states as follows:

> (2) This occupational safety and health standard is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, *and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to the subject.* Evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, may include, for example, but is not limited to, provisions for: developing and maintaining a written hazard communication program for the work-place, including lists of hazardous chemicals present; labeling of containers of chemicals in the

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Department of Labor. The portions of the Standard and the preamble that bear directly on the issues of this case will be quoted in full in the body and Appendix of this brief.

> workplace, as well as of containers of chemicals being shipped to other workplaces; preparation and distribution of material safety data sheets to employees and downstream employers; and development and implementation of employee training programs regarding hazards of chemicals and protective measures. Under section 18 of the Act, *no state or political subdivision of a state may adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan.*

52 Fed. Reg. 31877 (August 24, 1987) (Emphasis added).

In the preamble to the revised Standard, OSHA explained this provision as follows:

> The revised paragraph (a)(2) specifically provides that both state and local laws pertaining to occupational hazard communication are preempted by the Federal standard. In the one court decision which has addressed the question, the United States Court of Appeals for the Sixth Circuit ruled that the Federal Hazard Communication Standard preempts local as well as state laws. *Ohio Maunfacturers Association v. City of Akron*, 801 F.2d 824 (1986). The court noted that the text of § 1910.1200 (a)(2) did not mention localities and referred only to preemption of "state" laws. *Id.* at 827, 831-832. Nevertheless, relying upon references to local as well as state laws in the preamble to the 1983 standard, the court correctly inferred that OSHA had intended to preempt all non-Federal occupational hazard communication laws. *Id.* at 832. Therefore, in accordance with the Court decision, OSHA is making a technical amendment to paragraph (a)(2) so that it explicitly states that the HCS preempts local worker right-to-know laws.

52 Fed. Reg. 31,860-31,861.[2]

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[2] The portion of the preamble that discusses the preemption issue is set forth in full in the Appendix to this brief.

The revised Standard affects this case in two respects. First, it makes clear for the first time that OSHA *does* intend the Standard to preempt local, as well as state, laws dealing with matters that are covered by the Standard. Thus, one of the issues presented in the Jurisdictional Statement appears now to be settled.

Second, the elimination of the issue of OSHA's intent brings into even sharper focus the question of OSHA's statutory *authority* to preempt local laws that do not directly conflict with the Federal standard. Now that OSHA's intent to preempt such laws is clear, the issue of OSHA's authority to do so is unavoidable.

As we have explained in detail in the Jurisdictional Statement (pp. 18-22), the issue of OSHA's authority to preempt is perhaps the most important question presented in this case. The fact that this question is now squarely presented—unencumbered by any dispute as to the Agency's intent to preempt—makes this case all the more worthy of plenary review.[3]

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[3] Appellants' counsel recently became aware that in *Thornburgh v. American College of Obstetricians*, 106 S.Ct. 2169, 2175-76 (1986), this Court resolved the "undecided issue" of whether the Court's appellate jurisdiction under 28 U.S.C. § 1254(2) is limited to final judgments. Appellees apparently also overlooked that decision, for they failed to cite it in their Motion to Dismiss or Affirm. In light of *Thornburgh*, it appears that appellants should have brought this case before the Court by petition for certiorari rather than by appeal. There is no dispute, however, that the Court can treat the Jurisdictional Statement as a petition for certiorari and grant review on that basis (as it did in *Thornburgh*), and we urge that it do so here.

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APPENDIX

EXCERPT FROM PREAMBLE TO REVISED HAZARD COMMUNICATION STANDARD ISSUED AUGUST 24, 1987

The original Hazard Communication Standard included, at 29 CFR 1910.1200(a)(2), a generally-worded statement concerning the Agency's position regarding the preemptive effect of the standard. This paragraph has been revised to more explicitly state the Agency's position regarding preemption based on the provisions of the Act and related legal actions. This final rule significantly expands the number of industrial groups to which the Federal standard applies, and thus it significantly expands the area in which state and local laws will be preempted.

Section 18(a) of the Act, 29 U.S.C. § 667(a), provides that a state may assert jurisdiction through any court or agency over "any occupational safety or health issue with respect to which no standard is in effect under section 6." Conversely, where OSHA has issued a standard, section 18 expressly preempts states from asserting jurisdiction through any court or agency over the issue addressed by that standard, unless a Federally-approved State plan is in effect. 29 U.S.C. § 667(a) and (b); 29 CFR § 1901.2.

The express preemption provisions of the Act apply to all state or local laws which relate to an issue covered by a Federal standard, without regard to whether the state law would conflict with, complement, or supplement the Federal standard, and without regard to whether the state law appears to be "at least as effective as" the Federal standard. The "at least as effective as" test applies only to state standards adopted under an approved State plan. 29 U.S.C. § 667(c)(2). In enacting OSHA, Congress rejected provisions which would have permitted

states to enforce laws which were "not in conflict with" or "at least as effective as" Federal OSHA standards. *See* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, at 58, 706 (Comm. Print 1971). Instead, Congress enacted section 18 providing that Federally-approved State plans are the exclusive alternative to preemption.

Since the promulgation of OSHA's original Hazard Communication Standard, a number of court decisions have dealt with the effect of express and implied Federal preemption upon state and local hazard communication or "right-to-know" laws. *United Steelworkers of America v. Auchter*, 763 F.2d 728, 733-36 (3d Cir. 1985) (Federal Hazard Communication Standard expressly preempts state hazard disclosure laws in manufacturing sector); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985) (provisions of New Jersey right-to-know law which pertain primarily to community or environmental safety and health are not expressly preempted; right-to-know laws subject to implied preemption if they make it impossible to comply with Federal law or pose an obstacle to objectives of the Federal Act); *Manufacturers Association of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir. 1986) (similar holding in connection with Pennsylvania right-to-know law).

The revised paragraph (a)(2) specifically provides that both state and local laws pertaining to occupational hazard communication are preempted by the Federal standard. In the one court decision which has addressed the question, the United States Court of Appeals for the Sixth Circuit ruled that the Federal Hazard Communication Standard preempts local as well as state laws. *Ohio Manufacturers Association v. City of Akron*, 801 F.2d 824 (1986). The court noted that the text of section 1910.1200(a)(2) did not mention localities and referred

only to preemption of "state" laws. *Id.* at 827, 831-832. Nevertheless, relying upon references to local as well as state laws in the preamble to the 1983 standard, the court correctly inferred that OSHA had intended to preempt all non-Federal occupational hazard communication laws. *Id.* at 832. Therefore, in accordance with the Court decision, OSHA is making a technical amendment to paragraph (a)(2) so that it explicitly states that the HCS preempts local worker right-to-know laws.

The revised § 1910.1200(a)(2) not only defines hazard communication as an "issue" under the terms of the Act, but also enumerates the generic areas addressed by the standard for purposes of establishing the parameters of preemption. Thus any State or local government provision requiring the preparation of material safety data sheets, labeling of chemicals and identification of their hazards, development of written hazard communication programs including lists of hazardous chemicals present in the workplace, and development and implementation of worker chemical hazard training for the primary purpose of assuring worker safety and health, would be preempted by the HCS unless it was established under the authority of an OSHA-approved State plan.